

Supreme Court of the United States

OCTOBER TERM, 1963

No. 813

STEWART L. UDALL, SECRETARY OF THE
INTERIOR, PETITIONER

vs.

JAMES K. TALLMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

INDEX

Original Print

Proceedings in the United States Court of Appeals
for the District of Columbia Circuit

Joint appendix consisting of portions of the record
from the United States District Court for the
District of Columbia.....

A 1

Docket entries.....

B 2

Joint Appendix consisting of portions of the record
from the United States District Court for the
District of Columbia—Continued

Complaint for review, for declaratory judgment, and for injunctive relief.....	1	3
Exhibit A—List of Oil and Gas Lease Ap- peals.....	12	11
Exhibit B—Statement by Secretary of the Interior Fred A. Seaton on Oil and Gas Leasing On the Kenai Moose Range Alaska, January 29, 1958 and map show- ing the locations, Department of the In- terior, Information Service.....	16	15
Exhibit C—Notice of public drawing is- sued September 4, 1959 by The Bureau of Land Management.....	18	18
Exhibit D—Decisions of Department of In- terior, dated July 15, 1960, July 21, 1960 and July 15, 1960.....	25	27
Exhibit E—Opinion by Deputy Solicitor of the Department of the Interior, dated September 1, 1961.....	32	37
Exhibit F—Petition for exercise of super- visory authority.....	40	46
Draft of a proposed proclamation to establish the Kenai National Moose Range in Alaska, dated January 18, 1941.....	61	68
Exhibit G—Decision of Deputy Solicitor dated April 25, 1962.....	63	71
Defendant's motion to dismiss.....	65	72
Plaintiff's motion for summary judgment and response to defendant's motion to dismiss....	65	72
Statement under Rule 9(h) to accompany plain- tiffs' motion for summary judgment.....	66	73
Defendant's motion for summary judgment.....	70	76
Defendant's statement and counterstatement under Rule 9(h), etc.....	71	77
Defendant's response to plaintiffs' statement of material facts.....	72	78
Memorandum, McLaughlin, J.....	73	79
Judgment.....	74	80
Notice of appeal.....	75	81

INDEX

iii

	Original	Print
Opinion, Bastian, J.....	76	82
Concurring opinion, McGowan, J.....	87	92
Judgment.....	91	96
Petition for rehearing.....	92	97
Order denying petition for rehearing.....	96	99
Motion for leave to file and motion for reconsideration of denial of petition for rehearing	97	100
Motion for reconsideration of denial of petition for rehearing.....	99	101
Order granting leave to file motion for reconsideration and denying motion for reconsideration.....	115	110
Clerk's certificate (omitted in printing).....	118	110
Order extending time to file petition for certiorari.....	119	111
Order allowing certiorari.....	120	111

[fol.A]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17598

**JAMES K. TALLMAN, ALICE P. TALLMAN, CHRISTINE
FLEISCHER, WILLIAM O. RABOURN, HARRY B. COCKRUM,
BAILEY E. BELL, JAMES G. CARLSON, MICHAEL F.
BIERNE, JAMES E. O'MALLEY, and WALDO E. COYLE,
APPELLANTS**

vs.

**STEWART L. UDALL, SECRETARY OF THE INTERIOR,
APPELLEE**

[File Endorsement Omitted]

**Appeals From The United States District Court
For The District of Columbia**

JOINT APPENDIX—filed April 22, 1963

[fol. B]

IN THE UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES

- June 8, 1962 —Complaint with attached Exhibits A through G, CA 1852-62
- July 18, 1962 —Defendant's motion to dismiss
- August 23, 1962 —Plaintiff's motion for summary judgment
- August 23, 1962 —Statement under Rule 9(h) to accompany plaintiff's motion for summary judgment
- September 4, 1962—Defendant's motion for summary judgment
- September 4, 1962—Defendant's statement and counter-statement under Rule 9(h) of material facts as to which there is no genuine issue in support of defendant's motion for summary judgment
- September 4, 1962—Defendant's response to plaintiff's statement of material facts.
- October 16, 1962 —Memorandum by Judge Charles F. McLaughlin
- November 1, 1962—Judgment by Judge Charles F. McLaughlin
- December 31, 1962—Notice of appeal

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1852 - '62

JAMES K. TALLMAN, 1132 H Street, Anchorage, Alaska;
ALICE P. TALLMAN, 1132 H Street, Anchorage, Alaska;
CHRISTINE FLEISCHER, Palmer, Alaska; WILLIAM O.
RABOURN, c/o Bell, Sanders & Tallman, Box 1599, An-
chorage, Alaska; HARRY B. COGKRUM, 3705 N. Massa-
chusetts Avenue, Portland 17, Oregon; BAILEY E. BELL,
213 Central Building, Box 1599, Anchorage, Alaska;
JAMES G. CARLSON, c/o William H. Sanders, Box 1599,
Anchorage, Alaska; MICHAEL F. BEIRNE, 918—10th
Avenue, Anchorage, Alaska; JAMES E. O'MALLEY, 213
Central Building, Box 1599, Anchorage, Alaska; and
WALDO E. COYLE, Box 166, Kenai, Alaska, as individu-
als, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
WASHINGTON, D. C., DEFENDANT

COMPLAINT FOR REVIEW, FOR DECLARATORY JUDGMENT,
AND FOR INJUNCTIVE RELIEF—Filed June 8, 1962

The plaintiffs for their complaint represent as follows:

1. The plaintiffs are citizens of the United States and residents of the State of Alaska, except Harry B. Cockrum who is a resident of Oregon.

[fol. 2] 2. The defendant is the Secretary of the Interior of the United States and as such is charged with the administration of the laws relating to the public lands, including the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 30 U.S.C. § 181, et seq., as amended, and the Pickett Act of June 25, 1910, as amended, 43 U.S.C. §§ 141-142. The official residence of the defendant is the District of Columbia.

3. The matter in controversy, exclusive of interest and costs, exceeds \$10,000.

4. The jurisdiction of the Court is invoked under Title 11, Section 306 of the District of Columbia Code; upon the ground of diversity of citizenship, and upon the further ground that the construction and interpretation of federal statutes, executive orders, and regulations are involved and required. Plaintiffs seek relief under the terms of section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. § 1009, and under the terms of 28 U.S.C. §§ 2201 and 2202 relating to Declaratory Judgments. The Court has jurisdiction also by virtue of its inherent power to grant injunctive relief in the premises.

5. This case is concerned with the unlawful, unreasonable and arbitrary action of the defendant in failing and refusing to issue to each of the plaintiffs an oil and gas lease covering 2560 acres of public land in Alaska to which each of the plaintiffs, as a respective first qualified applicant therefor, is entitled under the statutes, executive order, and regulations hereinafter referred to, and under the decisions, rulings and declared policy of the Department of the Interior.

[fol. 3] 6. The land in suit embraces 2560 acres for each plaintiff, or a total of 25,600 acres, more or less, in the northern part of the Kenai National Moose Range. At all times herein material the 25,600 acres were public lands of the United States believed to contain oil and gas deposits and were not within any known geologic structure of a producing oil or gas field. The land in suit is more particularly described in Appendix A annexed hereto and made a part of this complaint.

7. Under the Act of August 8, 1946, section 3, 60 Stat. 951, 30 U.S.C. § 226, amendatory of the Mineral Leasing Act, the Secretary of the Interior is authorized to lease such oil and gas lands when open to leasing under the Mineral Leasing Act. The Act mandatorily requires that:

"... When the lands to be leased are not within any known geological structure of a producing oil or gas field, *the person first making application for the lease* who is qualified to hold a lease under this Act

shall be entitled to a lease of such lands without competitive bidding." (Emphasis supplied.)

Under the Act and long standing administrative decisions no application for an oil and gas lease under this section may be made of public lands reserved from oil and gas leasing, and a lease application for such closed lands grants the applicant no preference right over a subsequent applicant who submits the first application for the lands after the lands are open to oil and gas leasing.

8. The Kenai National Moose Reserve was established on December 16, 1941 by Executive Order No. 8979 (6 F. R. 6471) issued by President Franklin Delano Roosevelt [fol. 4] velt. The Executive Order provided that none of the lands within the Reserve, with certain exceptions,

"shall be subject to settlement, location, sale or entry, or other disposition . . . under any of the public land laws applicable to Alaska . . ."

Executive Order No. 8979 establishing the Reserve was promulgated pursuant to the power of the President under the 1910 Pickett Act, *supra*, as well as his inherent power under the Constitution, to withdraw lands from leasing under the Mineral Leasing Act and other public land laws for purposes such as wildlife refuges.

9. By Executive Order No. 10355 of May 26, 1952 (17 F. R. 4831) the President delegated to the Secretary of the Interior his power

"... to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." (Emphasis supplied.)

Under Departmental Regulations (24 F. R. 1348, Departmental Manual, §§ 200.2.1, 210.1.1, 210.1.2, 210.2.2A(4) (a)) the Secretary of the Interior has redelegated the authority delegated to him by the President in Executive Order No. 10355 relating to the creation or revocation of reservations of public lands to the Under Secretary and

certain Assistant Secretaries but has expressly not redelegated this power to the Solicitor or Deputy Solicitor of the Department.

10. On July 24, 1958 (published in the Federal Register of August 2, 1958) the Secretary of the Interior issued an order (23 F. R. 5883) with respect to the Kenai National Moose Reserve which expressly provided:

"Closed Area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:" (Emphasis supplied.)

The lands listed as "not opened" were in the southern part of the Reserve. As to the lands in the northern part of the Reserve, wherein the 25,600 acres involved in the present action lay, the Order provided:

"... lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 A.M., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlines in the regulation 43CFR 295.8."

The "agreement and map" were noted on the records on August 4, 1958, so that the lands involved in this case first became open to lease offers on August 14, 1958. The July 24, 1958 order under which the lands were opened followed new regulations pertaining to wildlife lands in general (Circular 1990, 43 CFR 192.9, January 8, 1958) and a classification by the Secretary in January, 1958, (attached and made part hereto as Exhibit B) deciding that the northern part of the Kenai Moose Range "will be opened."

11. Plaintiffs duly filed their respective offers to lease on or after August 14, 1958 in accordance with the procedure specified in the Secretary's Order of July 24, 1958,

supra. Their applications were the first received by the [fol. 6] Bureau of Land Management after the lands had been opened by the Secretary for lease offers. On September 4, 1959 the Bureau of Land Management issued a "Notice of Public Drawing" to "determine priorities between simultaneously filed oil and gas lease offers," which specifically included plaintiffs' applications. A copy of this Notice is annexed as Exhibit C and made a part of this complaint. The drawing was held on September 14, 1959. Subsequent to the drawing, plaintiffs remained the first lease applicants for the respective lands applied for of those applicants filing after August 14, 1958.

12. However, in decisions dated October 1, 5 and 7, 1959, the Chief, Minerals Adjudication Unit, Anchorage Land Office, rejected the plaintiffs' lease offers for the reason that they conflicted with leases issued during the fall of 1958, based on offers filed on various dates between October 15, 1954 and January 28, 1955.

13. Plaintiffs duly appealed to the Director of the Bureau of Land Management in accordance with the Department's rules of practice. By decisions by the Director and Acting Director dated July 21, 1960, July 15, 1960 and July 15, 1960, respectively, the decisions by the Chief of the Minerals Adjudication Unit, Anchorage was affirmed. The Director and Acting Director in rejecting plaintiffs' appeal stated that the lands involved were "opened to leasing within the Kenai National Moose Range, Alaska" pursuant to Circular 1990 of January 8, 1958. (See paragraph 10, *supra*.) Copies of these decisions are annexed as Exhibit D and made a part of this complaint.

[fol. 7] 14. Thereafter plaintiffs duly appealed to the Secretary of the Interior in accordance with the Department's rules of practice. The Secretary of Interior never acted upon the appeals. Instead a Deputy Solicitor of the Department of the Interior in an opinion dated September 1, 1961 rejected plaintiffs' appeals on different grounds from those asserted by the Director and Acting Director of the Bureau of Land Management. The Deputy Solicitor concluded that the lands within the Kenai National Moose Reserve withdrawn by Executive Order No.

8979 of December 16, 1941 were open to oil and gas leasing during 1954 and 1955 when the offers were filed upon which leases were issued in September 1958, because "nothing in the withdrawal specifically excludes those lands from the scope of the act." (A copy is attached as Exhibit E and made a part of this complaint.) Under Departmental Regulations discussed *supra*, paragraph 9, the Deputy Solicitor had no authority to open the Reserve. Plaintiffs' appeals to the Secretary of the Interior for the issuance of leases could have been rejected by the Deputy Solicitor for the Secretary only if the Kenai National Moose Range had been validly opened by the President or Secretary of the Interior to oil and gas leasing in 1954 and 1955.

15. Subsequent to the opinion of the Deputy Solicitor, plaintiffs undertook an investigation of the matters therein for the first time cited. As a result thereof, plaintiffs then, pursuant to Departmental procedures, duly filed a petition for exercise of supervisory authority with the defendant Secretary of the Interior on the grounds (1) [fol. 8] that newly discovered evidence from National Archives reveals that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve by Executive Order in 1941 that it be closed to leasing under the Mineral Leasing Act; (2) that the Deputy Solicitor lacked authority to decide plaintiffs appeals to the Secretary; and (3) that the Deputy Solicitor's purported decision conflicts with other decisions by Assistant Secretaries and other officials within the Department—a conflict which only the Secretary could resolve. A copy of plaintiffs' petition is attached hereto as Exhibit F as part of this complaint. In a decision dated April 25, 1962, again signed by the same Deputy Solicitor, plaintiffs' petition for exercise of supervisory authority, although allegedly considered on its merits, was denied. A copy of the decision of April 25, 1962 is attached hereto as Exhibit G as part of this complaint.

16. Plaintiffs have exhausted their administrative remedies.

17. The refusal of the defendant Secretary of the Interior to grant plaintiffs' petition for exercise of super-

visory authority, thereby rejecting plaintiffs' lease offers and refusing to issue noncompetitive oil and gas leases to plaintiffs as the first qualified applicants is unlawful, arbitrary, unreasonable and discriminatory, is in violation of the express and mandatory provisions of the Mineral Leasing Act of 1920, as amended, the Picket Act of 1910, as amended, and the applicable Executive Orders and regulations, and is contrary to the decisions, rulings and established administrative practice of the Department of the Interior. The unlawful and improper actions of the defendant herein complained of are particularized as follows:

[fol. 9] (1) In failing to rule that the new evidence from National Archives shows that the 1941 Executive Order establishing the Kenai National Moose Reserve closed the Reserve to oil and gas leasing offers until opened by the Secretary in his order issued July 24, 1958, although the decisions cited by the Deputy Solicitor in his opinion of September 1, 1961 relied upon such evidence in relation to established judicial construction of such orders, in deciding that the Reserve was previously open in 1954 and 1955.

(2) In refusing to recognize his own regulations and controlling law which grant no authority to a Deputy Solicitor to modify or revoke the Executive Order of 1941 establishing the Kenai National Moose Reserve so as to retroactively declare the Reserve open to oil and gas lease offers in 1954 and 1955 as a basis for the rejection of plaintiffs' lease offers made in August, 1958. As a consequence the Deputy Solicitor had no authority to decide plaintiffs' appeals to the Secretary.

(3) In failing to correct the purported opinion of the Deputy Solicitor rejecting plaintiffs' appeals which conflicted with other decisions by Departmental officials.

WHEREFORE, plaintiffs pray:

1. That the Court review the action of the defendant in accordance with the provisions of section 10 of the Administrative Procedure Act (5 U.S.C. § 1009);

[fol. 10] 2. That it be declared and adjudged that the defendant violated the provisions of the Mineral Leasing Act, the Pickett Act, and the applicable Executive Orders and Departmental regulations in refusing to grant plaintiffs' petition for exercise of supervisory authority and thereby ruling that the Kenai National Moose Reserve was open to oil and gas lease offers in 1954 and 1955 before opened by Order of the Secretary of July 24, 1958, published in the Federal Register of August 2, 1958;

3. That it be declared and adjudged that the Deputy Solicitor of the Department lacked authority to declare the Kenai National Moose Reserve open to oil and gas leases in 1954 and 1955, and lacking such authority could not validly decide and reject plaintiffs' appeals to the Secretary for the issuance of leases to them as the first qualified applicants;

4. That it be declared and adjudged that defendant violated section 17 of the Mineral Leasing Act of 1920 as amended in rejecting plaintiffs' lease offers.

5. That the defendant be directed to reinstate plaintiffs' lease offers and to issue noncompetitive oil and gas leases to plaintiffs as the first qualified applicants if their lease offers are otherwise regular and complete; or in the alternative that the defendant be directed to decide plaintiffs' appeals;


6. That the defendant pay to the plaintiffs the costs of this action;

[fol. 11] 7. That the plaintiffs have such other and further relief as is just and equitable.

/s/

CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.

[Duly sworn to by Charles F. Wheatley, Jr.
jurat omitted in printing]



[fol. 12]

EXHIBIT A TO COMPLAINT

OIL AND GAS LEASE APPEALS

JAMES K. TALLMAN—Anchorage 044843—2560 acres
Territory of Alaska—T. 6N, R9W, Seward Meridian

Beginning at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of two miles (10560'), thence West a distance of two miles (10560'), thence South a distance of two miles (10560'), thence East two miles (10560') to the place of beginning. The approximate legal subdivisions of said tract being Sections 25, 26, 35 and 36, Township Six North (T6N), Range Nine West (R9W), of the Seward Meridian, if and when surveyed.

ALICE P. TALLMAN—Anchorage 044844—2560 acres
Territory of Alaska—T6N, R10W, Seward Meridian

Beginning at the Northeast Corner of Section 1, Township 5 North, Range 10 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of two miles (10560'), thence West a distance of two miles (10560'), thence South a distance of two miles (10560'), thence East two miles (10560'), to the place of beginning. The approximate legal subdivisions of said tract being Sections 25, 26, 35 and 36, Township Six North (T6N), Range 10 West, (R10W), of the Seward Meridian, if and when surveyed.

CHRISTINE FLEISCHER—Anchorage 044842—2560
 acres

Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward

Meridian, Third Judicial Division of Alaska, thence running true North a distance of four miles (21120') to the true point of beginning, thence West a distance of two miles (10560') thence North 2 miles (10560') thence East a distance of two miles (10560'), thence South two miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 1, 2, 11 and 12, Township Six North, Range 9 West, of the Seward Meridian, if and when surveyed.

[fol. 13]

WILLIAM O. RABOURN—Anchorage 044845—2360 acres
Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running true North a distance of 2 miles (10560') to the true point of beginning, thence West a distance of 2 miles (10560'), thence North a distance of 2 miles (10560'), thence East 2 miles (10560'), thence South 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 13, 14, 23 and 24, Township 6 North, Range 9 West of the Seward Meridian, if and when surveyed.

HARRY B. COCKRUM—Anchorage 044846—2360 acres
Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence West two miles (10560') to the true point of beginning, thence North two Miles (10560'), thence West two miles (10560'), thence South two miles (10560'), thence East two miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 27, 28, 33 and 34, Township 6 North, Range 9 West, of the Seward Meridian, if and when surveyed.

BAILEY E. BELL—Anchorage 044847—2560 acres

Territory of Alaska—R6N, R9W, Seward Meridian

Commencing at the NE Corner of Section 1, Township 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120') to the true point of beginning, thence North 2 miles (10560'), thence West 2 miles (10560'), thence South 2 miles (10560'), thence East 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being Sections 29, 30, 31 and 32, T6N, R9W, of the Seward Meridian, if and when surveyed.

[fol. 14]

JAMES G. CARLSON—Anchorage 044848—2560 acres

Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Section 1, Township 5 North, Range 9 West, of the Seward Meridian, Third Judicial Division of Alaska, thence running West two miles (10560'), thence North four miles (21120'), to the true point of beginning, thence west two miles (10560'), thence North two miles (10560'), thence East two miles (10560'), thence South two miles (10560'), to the point of beginning. The approximate legal subdivisions of said tract being Sections 3, 4, 9 and 10, Township 6 North, Range 9 West of the Seward Meridian, if and when surveyed.

MICHAEL F. BEIRNE—Anchorage 044849—2560 acres

Commencing at the Northeast Corner of Sec. 1, Twsp. 5 N, Range 9 W, of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120'), thence North 2 miles (10560') to the true point of beginning, thence West 2 miles (10560'), thence North 2 miles (10560'), thence East 2 miles (10560'), thence South 2 miles (10560') to the point of beginning. The approxi-

mate legal subdivisions of said tract being Sections 17, 18, 19 and 20, T6N, R9W of the Seward Meridian, if and when surveyed.

JAMES E. O'MALLEY—Anchorage 044850—2560 acres
Territory of Alaska—T6N, R9W, Seward Meridian

Commencing at the Northeast Corner of Sec. 1, Twsp. 5 North, Range 9 West of the Seward Meridian, Third Judicial Division of Alaska, thence running West a distance of 4 miles (21120'), thence North 4 miles (21120'), to the true point of beginning, thence West two miles (10560'), thence North 2 miles (10560'), thence East 2 miles (10560'), thence South 2 miles (10560') to the point of beginning. The approximate legal subdivisions of said tract being all of Sections 5, 6, 7 and 8 of Twsp. 6 N, Range 9 W, of the Seward Meridian, if and when surveyed.

[fol. 15]

WALDO E. COYLE—Anchorage 045178—2400.81 acres
Alaska—T5N, R11W, Seward Meridian

Sec. 9 Lots 3, 4, 5, 6 & NE- $\frac{1}{4}$ SW- $\frac{1}{4}$
S- $\frac{1}{2}$ NE- $\frac{1}{4}$, S- $\frac{1}{2}$ SW- $\frac{1}{4}$, SE- $\frac{1}{4}$

Sec. 10, N- $\frac{1}{2}$ NE- $\frac{1}{4}$, SE- $\frac{1}{4}$, SE $\frac{1}{4}$, Lots 4,5,6,8,9,10,11

Sec. 11, Lots 1 thru 9 and N $\frac{1}{2}$ NW- $\frac{1}{4}$, SE- $\frac{1}{4}$ SW- $\frac{1}{4}$
W- $\frac{1}{2}$ NE- $\frac{1}{4}$. NE- $\frac{1}{4}$ SE- $\frac{1}{4}$, E- $\frac{1}{2}$ SW- $\frac{1}{4}$

Sec. 14, Lots 1 thru 7, 9, 10, 12

Sec. 16, Lots 1 thru 10, NW- $\frac{1}{4}$ NW- $\frac{1}{4}$, SE $\frac{1}{4}$ SW- $\frac{1}{4}$

Sec. 18, SW- $\frac{1}{4}$ SE- $\frac{1}{4}$, E- $\frac{1}{2}$ SE- $\frac{1}{4}$

Sec. 19, Lots 7, 8, 9, 11, 13 and SE- $\frac{1}{4}$ NE- $\frac{1}{4}$
SE- $\frac{1}{4}$

Sec. 36, Lots 1 thru 8 and SW- $\frac{1}{4}$ SE- $\frac{1}{4}$

[fol. 16] EXHIBIT B To COMPLAINT

[SEAL]

DEPARTMENT OF THE INTERIOR

Information Service

STATEMENT BY SECRETARY OF THE INTERIOR
FRED A. SEATON ON OIL AND GAS LEASING ON
THE KENAI MOOSE RANGE, ALASKA, JANUARY
29, 1958

I have approved this week a classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development. The closed section—about 1,689 square miles—includes all areas on which the Fish and Wildlife Service believes oil and gas development would be incompatible with wildlife management purposes.

In those areas of the Kenai Moose Range open to oil and gas leasing—about 1,525 square miles—operations will be subject to stipulations which provide maximum protection for fish and wildlife.

The lands open to leasing lie primarily north of the Sterling Highway and include the current oil-producing area and two proposed new unit areas. Also included in the open areas will be the Swanson River Valley, lands around the towns of Kenai and Kasilof, and the Soldonata area. All good spawning and rearing areas for salmon will be protected, and important waterfowl areas will be preserved. Also, because of its scenic beauty, an area at Bedlam Lake will be closed.

I am assured by Assistant Secretary Leffler that this action opening a portion of the Kenai range subject to the proposed regulated development is entirely consistent with the primary purpose for which the range is managed.

A map showing the locations of the open and closed areas is attached.

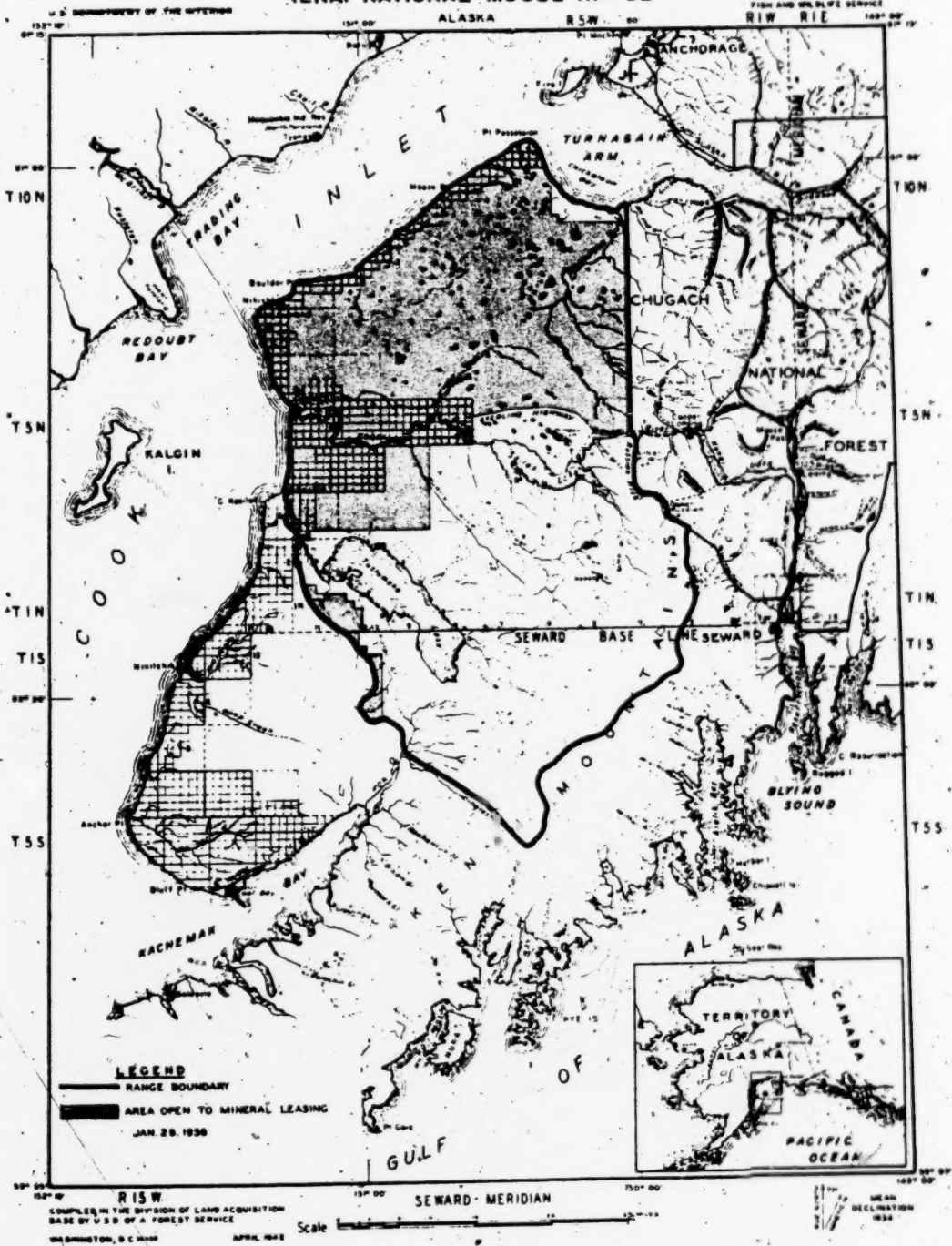
As of today no classifications of other areas have been completed. The Fish and Wildlife Service, the Bureau of Land Management and the Geological Survey, as I ad-

vised you at our last press conference, are proceeding as rapidly as possible on classification procedures for other wildlife lands.

When the classification procedures have been completed and approved, they will be sent to the field personnel of the Fish and Wildlife Service, the Bureau of Land Management, and the Geological Survey. We will seek a speedy, but thorough, classification. It will be made initially by employees who know land and wildlife values, assisted by technicians who can judge properly the possibility of mineral occurrences. The final decision in all classifications, of course, rests with the Secretary of the Interior.

[fol. 17]

KENAI NATIONAL MOOSE RANGE



[fol. 18]

EXHIBIT C TO COMPLAINT

In Reply Refer To:
ALO:M4

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
334 E. Fifth Avenue
Anchorage, Alaska

September 4, 1959

NOTICE OF PUBLIC DRAWING

Horace C. Allen, Jr., et al.
Anchorage 045221, et al.
Oil & Gas

Numerous oil and gas lease offers¹ were filed during the simultaneous period established in accordance with the agreement classifying the lands in the Kenai National Moose Range, Alaska, for oil and gas leasing purposes, pursuant to the regulations, 43 CFR 192.9 (Circular 1990), approved by the Secretary on January 8, 1958.

43 CFR 192.9(b) (3) and (c) state in pertinent part as follows:

"Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records."

The records were noted August 4, 1958, therefore, all offers filed for these lands on or after 10:00 A.M., August 14, 1958 and until and including 10:00 A.M. on the tenth day thereafter, which in this instance must be Monday,

¹ The names & address of the offerors and serial numbers of their respective oil & gas lease offers appear in Appendix "A", attached hereto.

August 25, 1958, as the land office was not open Sunday. August 24, 1958, are considered as simultaneously filed.

A public drawing is required to determine priorities between simultaneously filed oil and gas lease offers, therefore, such a drawing will be held involving the oil and gas offers in question¹ at the Anchorage Land Office, 334 E. Fifth Avenue, Anchorage, Alaska, in accordance with the governing regulations, 43 CFR 295.8(c), at 2:00 P.M., September 14, 1959.

A defective oil and gas lease offer will not afford the offeror priority until the defect is cured, therefore, the public drawing will be held to establish priority for issuance of leases and will in no way validate a defective application when the offer is reached for adjudication.

No notice of the results of this drawing will be mailed to the offerors listed. However, a tabulation indicating the established priority awarded will be posted on the bulletin board of the Anchorage Land Office and will remain posted for thirty days from the date of the drawing.

/s/ Irving W. Anderson
IRVING W. ANDERSON
Manager

[fol. 19]

APPENDIX "A"

Name & Address	<u>Serial Number</u>
Horace C. Allen, Jr. 971 Tucson Aurora, Colorado	Anchorage 045221
James D. Alderman 3990 Otis Wheatridge, Colorado	Anchorage 045201
Bailey E. Bell 213 Central Building, Box 1599 Anchorage, Alaska	Anchorage 044847
Dr. Michael F. Beirne 918 - 10th Avenue Anchorage, Alaska	Anchorage 044849
John H. Brunel 2985 Reed Street Denver 15, Colorado	Anchorage 045217
J.M. Bryan 10 Requa Place Piedmont, California	Anchorage 045245, 045246, 045247, 045248, 045249, 045251, 045252, 045253, 045254, 045255, 045256, 045257, 045258, 045259, 045260, 045261, 045262, 045263, 045264
James G. Carlson c/o William H. Sanders Box 1599 Anchorage, Alaska	Anchorage 044848
Donald D. Church RFD Wasilla, Alaska	Anchorage 044968, 044969
O. Etola Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045163
Dale R. Cochran 3531 Cortez Drive Dallas 20, Texas	Anchorage 045164, 045165

[fol. 20]

Name & Address**Serial Number**

Thelma E. Cochran
3531 Cortez Drive
Dallas 20, Texas

Anchorage 045166

James E. Cochran
3531 Cortez Drive
Dallas 20, Texas

Anchorage 045167

Harry B. Cockrum
3705 N. Massachusetts Avenue
Portland 17, Oregon

Anchorage 044846

Waldo E. Coyle
Box 166
Kenai, Alaska

Anchorage 045169, 045170,
045171, 045172*,
045174, 045175,
045176, 045177,
045178

Jaye F. Dyer
9230 West 9th
Denver 15, Colorado

Anchorage 045216

Sal Eisenberg
636 N. La Brea Avenue
Los Angeles, California

Anchorage 045098, 045100*,
045124, 045149

Jean Erickson
726 K. Street
Anchorage, Alaska

Anchorage 045369, 045370,
045371, 045372,
045373, 045374,
045375, 045376,
045377, 045378,
045379*, 045380,
045381, 045382,
045383

Anthony Evanco
Box 1545
Anchorage, Alaska

Anchorage 045059, 045060,
045061, 045062

Mrs. Christine Fleischer
Palmer, Alaska

Anchorage 044842

H. Roland Glaiser & Alfred V. Hagen
Westward Hotel
Anchorage, Alaska

Anchorage 045279, 045280,
045281, 045282,
045283

Harry G. Gadlove
P. O. Box 1091
Anchorage, Alaska

Anchorage 044978

Name & Address

Serial Number

Maurice Mac Goodstein
405 N. Palm Drive
Beverly Hills, California

Anchorage 045086, 045113*,
045132, 045136,
045137, 045148

[fol. 21]

Jane Goodstein
405 N. Palm Drive
Beverly Hills, California

Anchorage 045090, 045109
045112

W. Pershing Grace
2095 Oakland
Aurora, Colorado

Anchorage 045223

L. E. Grammer
Box 787
Anchorage, Alaska

Anchorage 044851, 044852,
044853, 044854

Virginia Gratias
Box 843
Anchorage, Alaska

Anchorage 045181

W. H. Gregory & Alfred V. Hagen
Box 38
Anchorage, Alaska

Anchorage 045160

Rose Haimes
612 S. Hauser
Los Angeles, California

Anchorage 045125, 045127

Charles M. Heard
2555 Cody Court
Denver 15, Colorado

Anchorage 045220, 045228

R. A. Hildebrand
Box 1648
Grand Junction, Colorado

Anchorage 045051, 045154

Sam Joseph
178 N. Clark
Beverly Hills, California

Anchorage 045118, 045122
045139, 045140

Harold Koslosky
810 M Street
Anchorage, Alaska

Anchorage 045349, 045350

Henry H. Knackstedt
Box 52
Kenai, Alaska

Anchorage 045179, 045180

C. V. Lindorff
2420 S. Ogden Street
Denver 10, Colorado

Anchorage 045219, 045227

Name & AddressSerial Number

Don R. Link
841 Petroleum Club Building
Denver, Colorado

Anchorage 045192

[fol. 22]

J. R. Mann
1312 Bank of the Southwest Building
Houston 2, Texas

Anchorage 044945

Glen S. Miller
112 W. Ray Street
Seattle 99, Washington

Anchorage 045285

Robert A. Moffett
7720 Brookmill Road
Downey, California

Anchorage 045105, 045107,
045145, 045146

Clarabell Murdock
1388 S. Zuni
Denver 23, Colorado

Anchorage 045182, 045186,
045190*, 045198

Vera G. Nelson
620 D. Street
Anchorage, Alaska

Anchorage 045157

Lawrence W. Nelson
Alfred V. Hagen
Box 1561
Anchorage, Alaska

Anchorage 045367

Newton H. Neustadter, Jr.
60 Sea Cliff Avenue
San Francisco, California

Anchorage 045053, 045054,
045055, 045056,
045058

Ohio Oil Company
550 S. Flower Street
Los Angeles 17, California

Anchorage 044986, 044987,
044988, 044989,
044990, 044991

James E. O'Malley
213 Central Building, Box 1599
Anchorage, Alaska

Anchorage 044850

George Orling
232 No. Almont
Beverly Hills, California

Anchorage 045099, 045103

Sanford Orling
178 N. Clark
Beverly Hills, California

Anchorage 045143, 045144

Name and AddressSerial Number

C. A. Patchen
3459 S. Fairfax
Denver 22, Colorado

Anchorage 045218

Glenn R. Penland
Box 1753
Anchorage, Alaska

Anchorage 045361, 045362,
045363, 045364

[fol. 23]

Pexco Inc.
155 Montgomery Street
San Francisco, California

Anchorage 045230*, 045231,
045233, 045234,
045235, 045236,
045237, 045238,
045240, 045241,
045242, 045244
045243*

Howard K. Phillips
1115 First National Bank Building
Denver 2, Colorado

Anchorage 045225

Harry J. Pursell
Box 320
Anchorage, Alaska

Anchorage 045310

William O. Rabourn
c/o Bell, Sanders & Tallman
Box 1599
Anchorage, Alaska

Anchorage 044845

Alva D. Saxton
Alfred V. Hagen
Box 1847
Palmer, Alaska

Anchorage 045161

Charles Schraier
3036 Watseka Avenue
Los Angeles, California

Anchorage 045087, 045097

John I. Schumacher
Box 1648
Grand Junction, Colorado

Anchorage 045052, 045064,
045065, 045066

Roy S. Scott, Jr.
1115 -1st National Bank Building
Denver 2, Colorado

Anchorage 045224

Adele Silverman
2657 S. Bedford
Los Angeles, California

Anchorage 045123, 045133,
045135, 045151

Name & Address

Floyd D. Smith
Box 66
Wasilla, Alaska

Betty J. Spelta
2207 Alder Cir. Drive
Anchorage, Alaska

Burl C. Stephens, Jr.
P. O. Box 2083
Anchorage, Alaska

[fol. 24]

Mrs. Sue Stricklett
11739 Hortense
North Hollywood, California

James C. Stricklett
11739 Hortense
North Hollywood, California

James K. Tallman
1132 H Street
Anchorage, Alaska

Alice P. Tallman
1132 H Street
Anchorage, Alaska

Robert F. Thurrell, Jr.
239 S. Dohlia Street
Denver 22, Colorado

Frank P. Turner
2585 South Newton
Denver 19, Colorado

Union Oil Co. of California
Union Oil Center
P. O. Box 7690
Los Angeles 54, California

Viola M. Vermillion
4311 LaMont Circle
Bellaire, Texas

Serial Number

Anchorage 044981, 044982,
044983, 044984

Anchorage 045286

Anchorage 045295

Anchorage 045089, 045092,
045119, 045128

Anchorage 045091*, 045111,
045119, 045128

Anchorage 044843

Anchorage 044844

Anchorage 044874, 044785,
044876, 044879,
044880, 045185,
045187, 045188,
045193, 045194,
045195, 045197

Anchorage 045222

Anchorage 045204, 045205,
045206, 045207,
045208, 045209*,
045210, 045211

Anchorage 044941, 044942,
044943, 044944

Name & Address

Jack V. Walker
Box 2256
Anchorage, Alaska

John E. Walters
8814 Winningham
Houston 24, Texas

Louis L. Watson
739 Revere
Aurora, Colorado

T. Stanton Wilson
Box 1753
Anchorage, Alaska

Serial Number

Anchorage 045158

Anchorage 044948, 044949,
044950, 044951

Anchorage 045183, 045184,
045196, 045199

Anchorage 045351, 045352,
045353, 045354,
045355, 045356,
045357, 045358,
045359

Asterisk (*) indicates only a portion of offer within Executive Order 8979 to be considered in simultaneous drawing.

[fol. 25]

EXHIBIT D TO COMPLAINT

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Anchorage 044843
044844
5.04g

July 15, 1960

Certified Mail
Return Receipt Requested

DECISION

James K. Tallman
Alice P. Tallman

Oil and Gas

Decisions Affirmed

The above named parties have appealed from separate decisions of the Chief, Minerals Adjudication Unit, Anchorage Land Office, date October 7, 1959, which rejected oil and gas lease offers Anchorage 044843 and 044844 filed August 14, 1958, under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers for unsurveyed lands in areas open to leasing within the Kenai National Moose Range, Alaska (Circular 1990, 43 CFR 192.9(d)) were rejected for the reason that the lands are embraced in leases Anchorage 028080 and 028082 issued effective September 1, 1958, pursuant to prior filed offers pending on January 10, 1958 (43 CFR 192.9(d) and (e)). The decisions stated that the issued leases embrace the nontidal navigable waters within their exterior boundaries pursuant to timely exercised preference rights granted by section 6 of the Act of July 3, 1958 (Public Law 85-505; 72 Stat. 322) and the appellants' offers to this extent were also rejected.

The appellants contend that Anchorage 028030 and 028082 are an absolute nullity because the offers were filed prior to the opening of the lands to leasing. They also state that the leases having issued for 25 cents an acre while their offers were filed for 50 cents an acre was arbitrary, willful and intentional give away of public property and the leases should be rescinded.

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the appellants' offers for the reasons stated. The appellants' contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the Act of July 3, 1958 (72 Stat. 322) expressly provides that a rental rate of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers pending on May 3, 1958. See *Solicitor's Opinion*, M-36523 (August 1, 1958). The first year rental rate of 50 cents per acre is required with respect to all offers filed on or after May 3, 1958. *J.W. Bauler et al.*, 66 I.D. 377, (1959).

[fol. 26] Accordingly, the decisions of the Chief, Minerals Adjudication Unit, rejecting the appellants' offer were proper and are hereby affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be \$5.00 in each case. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Alice P. Tallman then the adverse party to be served is:

Hal W. Stewart
306 East McPherson
Findlay, Ohio

If an appeal is taken by James K. Tallman then the adverse party to be served is:

D. J. Griffin
221 E. Lincoln Street
Findlay, Ohio

/s/ Earl J. Thomas
Acting Director

Enclosure

DISTRIBUTION:

Mr. James K. Tallman (Certified Mail)
Mrs. Alice P. Tallman (Certified Mail)
Mr. Hal W. Stewart (Regular Mail)
Mr. D. J. Griffin (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
WJ

76861-60

[fol. 27]

In reply refer to:

Anchorage 044842 and
044845 through 044850
5.04g

July 21, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

Christine Fleischer
William O. Rabourn
Harry B. Cockrum
Bailey E. Bell
James A. Carlson
Michael F. Beirne
James E. O'Malley

Oil and Gas

Decisions Affirmed

The above-named parties appealed from separate decisions of the Chief, Minerals Adjudication Unit, Anchorage Land Office, dated October 1 and 5, 1959, which rejected the above-noted oil and gas lease offers, filed August 14, 1958, under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers for unsurveyed lands in the areas opened to leasing within the Kenai National Moose Range, Alaska (Circular 1990, 43 CFR 192.9(d)) were rejected for the reason that the lands applied for are embraced in leases¹ (listed) which issued pursuant to prior filed offers pending on January 10,

¹ Anchorage 044848 held to be in conflict with 028988 is corrected to show the conflict is with Anchorage 028983—the records further show that Anchorage 028986 and 028991 were partly segregated into Anchorage 051421 and 051423, respectively.

1958 (43 CFR 192.9(d) and (e)). The decisions stated further that the leases embraced the non-tidal navigable waters within their exterior boundaries pursuant to timely exercised preference rights granted by section 6 of the act of July 3, 1958 (Public Law 85-505; 72 Stat. 322), and the appellants offers to this extent were also rejected.

The appellants do not dispute the facts, however, they contend, in effect, that the issued leases are an absolute nullity because the offers were filed prior to the opening of the land within the Kenai National Moose Range to [fol. 28] leasing. Furthermore, the leases issued for 25 cents an acre while the appellants offers were filed for 50 cents an acre was an arbitrary, wilful and intentional giveaway of public property and the leases should be considered void.

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the appellants offers for the reason stated. The appellants contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the act of July 3, 1958 (72 Stat. 322) expressly provides that rental of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers filed prior to and pending on May 3, 1958. See *Solicitor's Opinion*, M-36523 (August 1, 1958).¹

Accordingly, the decisions of the Chief, Minerals Adjudication Unit, rejecting the offers were proper and they are hereby affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the

¹ The 50 cent per acre rental applies to all lease offers filed on or after May 3, 1958. *J. W. Bauler et al.*, 66 I.D. 377 (1959).

filing fee will be computed on the basis of \$5 for each lease offer included in the appeal. If the appeal covers all offers adversely affected by this decision the total filing fee is \$35. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken by the appellant listed then the adverse party or parties shown opposite the appellant's name must be served:

<u>Appellant</u>	<u>Party to be served</u>
Christine Fleischer (Anchorage 044842)	Fred W. Axford (Anchorage 028986 & Anchorage 051421) 12368 North Melody Lane Los Altos Hills, California
William O. Rabourn (Anchorage 044845)	Fred W. Axford (Anchorage 029000) (Same address as above)
Harry B. Cockrum (Anchorage 044846)	Boris L. Erwin, Trustee (Anchorage 028150) 525 3rd Avenue Anchorage, Alaska
[fol. 29]	
Bailey E. Bell (Anchorage 044847)	W. B. Emery II (Anchorage 028081) 4418 Frazier Avenue Bakersfield, California
James G. Carlson (Anchorage 044848)	Fred W. Axford (Anchorage 028983) 12368 North Melody Lane Los Altos Hills, California
Michael F. Beirne, M.D. (Anchorage 044849)	Fred W. Axford (Anchorage 028991 & 051423) (Same address as above) Michael T. Halbouty (Anchorage 028953, 028955) 5111 Westheimer Road Houston, Texas King Oil, Inc. (Anchorage 028953, 028955) 620 Oil and Gas Building Wichita Falls, Texas

Appellant

James E. O'Malley
(Anchorage 044850)

Party to be served

Fred W. Axford
(Anchorage 029001, 028991, 051423)
(Same address as above)

/s/ Edward Woosley
Director

Enclosures

DISTRIBUTION:

James K. Tallman, Attorney for the appellants (Certified Mail)

Mrs. Christine Fleischer (Regular Mail)

William O. Rabourn (Regular Mail)

Harry B. Cockrum (Regular Mail)

Bailey E. Bell (Regular Mail)

James G. Carlson (Regular Mail)

Michael F. Beirne (Regular Mail)

James E. O'Malley (Regular Mail)

Minerals Staff Officer (3)

Geological Survey (3)

Appeals List No. 1

WJ

76861-60

[fol. 30]

In reply refer to:
Anchorage 045178
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 15, 1960

Certified Mail
Return Receipt Requested

DECISION

Waldo E. Coyle

Oil and Gas

Decision Affirmed

Mr. Waldo E. Coyle has appealed from a decision of the Chief, Minerals Adjudication Unit, Anchorage Land Office, dated October 13, 1959, which rejected oil and gas lease offer Anchorage 045178 filed August 22, 1958,¹ as to those lands applied for in the areas opened to leasing within the Kenai National Moose Range, Alaska, (Circular 1990, 43 CFR 192.9(d) held to be in conflict with leases Anchorage 028103, 028138, 028140, 045643 and 046693 which issued pursuant to prior filed offers pending on January 10, 1958 (43 CFR 192.9(d) and (e)).

In his appeal, appellant does not dispute the facts, however, he contends in effect that the issued leases are an absolute nullity because the offers therein were filed prior to the opening of the land within the Kenai National Moose Range to leasing. Furthermore, the leases having issued for 25 cents an acre while his offer was filed for 50 cents an acre was an arbitrary, wilful and intentional give away of public property and the leases should be considered void.

¹ Under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

The records verify the status of the lands as determined by the Chief, Minerals Adjudication Unit, and his application of the revised regulation cited and his interpretation of it were correct. The leases having issued properly, it was proper to reject the offer for the reasons stated. The appellants contentions to the contrary are not meritorious including the contention concerning the lower rental of 25 cents an acre as being arbitrary. Section 10 of the Act of July 3, 1958 (72 Stat. 322) expressly provides that rental of 25 cents per acre for the first lease year is applicable to all leases issued pursuant to lease applications or offers pending on May 3, 1958. See *Solicitor's Opinion*, M-36523 (August 1, 1958). The 50 cents per acre rental is required with respect to all offers filed on or after May 3, 1958. J. W. Bauler et al., 66 I.D. 377 (1959).

[fol. 31] Accordingly, the decision of the Chief, Minerals Adjudication Unit, rejecting the offer for the aforementioned reasons was proper and it is hereby affirmed.

Mr. Coyle is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of \$5.00. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Coyle thea the adverse parties to be served are:

Estate of E. Wells Ervin
C/o Doris L. Ervin
Arnell & Burr Law Office
204 Turnagain Arms
Anchorage, Alaska

M. B. Kirkpatrick
525 3rd Ave.
Anchorage, Alaska

/s/ Earl J. Thomas
Acting Director

Enclosure

DISTRIBUTION:

James K. Tallman, Bell, Sanders & Tallman, Attorneys
at Law (Certified Mail)

Mr. Waldo E. Coyle (Regular Mail)

Mr. D. A. Burr, Arnell & Burr, Attorneys at Law (Regu-
lar Mail)

Estate of E. Wells Ervin (Regular Mail)

M. B. Kirkpatrick (Regular Mail)

Minerals Staff Officer (3)

Geological Survey (3)

Appeals List No. 1

WJ

76861-60

[fol. 32]

EXHIBIT E TO COMPLAINT

97839-61

JAMES K. TALLMAN ET AL

A-28594

A-28609

A-28619

Decided September 1, 1961

Oil and Gas Leases: Lands Subject to—Wildlife Refuges and Projects—Withdrawals and Reservations: Effect of

Public land withdrawn for the protection of wildlife is not thereby removed from the operation of the Mineral Leasing Act and, in the absence of affirmative action by the Department closing the area to oil and gas leasing, offers to lease the land for oil and gas purposes may be filed.

Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior may, in his discretion, refuse to lease land reserved for a particular purpose but subject to leasing under the Mineral Leasing Act where such leasing would be incompatible with the purpose for which the land is reserved.

Oil and Gas Leases: Applications

Offers to lease lands which were at the time of filing open to the filing of such offers are entitled to prior consideration over offers filed at a later date, following an interim when the area was closed to the filing of such offers.

Oil and Gas Leases: Rentals

Offers to lease lands in Alaska filed prior to and pending on May 3, 1958, are entitled to the benefit of section 10 of the act of July 3, 1958, notwithstanding the fact that action on such offers had been suspended by the Department.

[fol. 33]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28594

James K. Tallman
Alice P. Tallman

Anchorage 044843
Anchorage 044844

A-28609

Christine Fleischer
William O. Rabourn
Harry B. Cockrum
Bailey E. Bell
James G. Carlson
Michael F. Beirne
James E. O'Malley

Anchorage 044842
Anchorage 044845
Anchorage 044846
Anchorage 044847
Anchorage 044848
Anchorage 044849
Anchorage 044850

A-28619

Waldo E. Coyle

Anchorage 045178

Oil and gas lease offers
rejected.

Affirmed.

APPEALS FROM THE BUREAU OF LAND
MANAGEMENT

James K. Tallman and others have appealed to the Secretary of the Interior from decisions of the Director and the Acting Director of the Bureau of Land Management affirming decisions of the Anchorage, Alaska, land office in rejecting their offers, filed on or after August 14, 1958, to lease for oil and gas purposes lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers were rejected because they conflicted with leases issued during the fall of 1958, based on offers filed on various dates between October 15, 1954, and January 28, 1955.

The appellants contend that the leases based on the prior offers are null and void because the lands were not

open for the filing of offers when those offers were filed. They contend that they, the appellants, are the first qualified applicants for the lands. They contend, further, that the prior offers, having been suspended, were not "pending" offers within the meaning of section 10 of the act of July 3, 1958 (72 Stat. 322, 324), amending section 22 of the Mineral Leasing Act (30 U. S. C., 1958 ed., sec. 251), and that it was error to have issued those leases at a rental of 25 cents per acre for the first year of the leases.

[fol. 34]

The Moose Range was established on December 16, 1941, by Executive Order No. 8979 (6 F. R. 6471). The lands described in the order were, "for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose of the Kenai Peninsula, Alaska, * * * withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose.

The order provides, with respect to a large part of the Range, that those lands shall not be subject to settlement, location, sale, or entry or other disposition under any of the public land laws applicable to Alaska or for classification or use under enumerated laws applicable only to Alaska.¹ Small portions of the Range were left available for settlement, location, sale, or entry, with the proviso that those lands were to be classified. Those lands classified as not suitable for settlement were no longer to be available for that purpose.²

The establishment of the Range did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*) This is so because nothing in the withdrawal specifically excludes those lands from the scope of the act. While such lands are open for leasing under the terms of

¹ All of the prior offers involved in these appeals except those in conflict with the Coyle offer (Anchorage 045178) cover lands in this category.

² The prior offers in conflict with Coyle's offer cover land left available for settlement, location, sale or entry.

the Mineral Leasing Act in the sense that offers to lease such lands may be filed, the Secretary of the Interior may, in the exercise of the discretion vested in him by the act, refuse to issue leases covering such reserved areas where the mineral development of the lands might seriously impair or destroy the purpose for which the lands are reserved. *West Central Corporation*, A-28523 (February 2, 1961); *Noel Teuscher et al*, 62 I.D. 210 (1955); *Martin Wolfe*, 49 L.D. 625 (1923).³

Thus unless some action taken after the Range was established and before these prior offers were filed closed the lands covered by those offers to the filing of oil and [fol. 35] gas lease offers, there was no prohibition against the filing of these prior offers.⁴

³ That the Secretary's discretion in the matter of the leasing of lands subject to the operation of the Mineral Leasing Act remains unimpaired, notwithstanding the material revision of that act in 1946, has recently been affirmed by the United States Court of Appeals, District of Columbia Circuit, in *Haley v. Seaton*, 281 F. 2d 620, 625 (1960).

⁴ Appellants contend that Public Land Order 487 of June 16, 1948 (13 F. R. 3462), Public Land Order 1212 of September 9, 1955 (20 F. R. 6795), and an amendment thereof on October 14, 1955 (20 F. R. 7904), indicate an intention on the part of the Department not to open the Range, or at least that part of the Range affected by Public Land Order 487, to mineral leasing applications. Only the land involved in the Coyle offer was affected by Public Land Order 487. That order temporarily withdrew certain land in the Range, including the land covered by prior offers in conflict with the Coyle offer, which had theretofore been available for settlement, location, sale, or entry, from such settlement, location, sale or entry and reserved the land for classification, examination, and in aid of proposed legislation. The order provided that it took precedence over but did not modify the reservation for the Moose Range. However, Public Land Order 487 did not withdraw the land affected thereby from the operation of the Mineral Leasing Act or close that land to the filing of oil and gas lease applications any more than Executive Order No. 8979 did. The prior offers in conflict with the Coyle offer were filed while Public Land Order 487 was in effect.

Public Land Order 1212 revoked Public Land Order 487 and opened the lands for acquisition under specified laws and subject to the conditions set forth therein. Although Public Land Order 1212, as first published, appeared to delay the opening of the lands affected thereby to mineral leasing, the amendment of the order,

The only action taken by the Department with respect to lands reserved for the protection of wildlife, but otherwise available for leasing subject to such requirements as might be imposed for the protection and use of the lands for the purpose for which they were reserved (43 CFR 191.5; 43 CFR 192.9), was the suspension, on August 31, 1953, of action on all pending offers for oil and gas leases covering lands within wildlife refuges. This suspension was put into effect because of a study then in progress by the Department to determine whether there should be a revision in the policy of leasing such lands. That suspension did not prohibit the filing of offers to lease such lands but merely ordered the managers of the various land offices not to issue leases on refuge lands. Although that suspension was in effect when the offers in conflict with the appellant's offers were filed, it can not be said that the lands covered by those offers were not open to the filing of such offers on the various dates on which those offers were filed.

[fol. 36] The appellants have not pointed to, and I am not aware of, any action taken by the Department subsequent to the filing of the offers in 1954 and 1955 which would have required the rejection of those offers.

The regulation (43 CFR 192.9) relating to the leasing for oil and gas purposes of lands set aside for the protection of wildlife was amended on December 2, 1955 (20 F. R. 9009), to make certain of those areas unavailable for leasing under the terms of the Mineral Leasing Act, to provide that leases would be issued covering certain other designated areas only upon the approval of complete and detailed operating programs for those areas, and to set forth the conditions which must be expressed in any leases issued covering the balance of the lands set aside as wildlife refuges. Although that amendment set forth the determination that only those areas designated in Appendix A thereto would no longer be available for oil and gas leasing,⁵ the suspension on the issuance of leases

deleting the language referring to mineral leasing, makes it clear that the order was intended to have no such effect.

⁵ The lands involved in the present appeals are not among those lands designated as being unavailable for leasing.

on lands remaining open to leasing was reimposed early in 1956.

On January 8, 1958, the regulation was again amended (23 F.R. 227; 43 CFR, 1959 Supp., 192.9). That regulation defines the various types of lands covered thereby, including Alaska wildlife areas, which are:

"areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service." (Sec. 192.9(a)(4).)

The regulation then sets forth the leasing policy and procedure which will be followed with respect to the various categories of the areas defined. In so far as the regulation is pertinent to the present appeals, it provides that as to the Alaska wildlife areas (into which the Range naturally falls) representatives of the Bureau of Land Management and the United States Fish and Wildlife Service would confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing but that no such agreement would be effective until approved by the Secretary of the Interior (sec. 192.9(b)(3)); that those lands not closed to leasing would be subject to lease on the imposition of stipulations agreed upon by the two aforementioned agencies of the Department (sec. 192.9(b)(4); that the agreements referred to in sec. 192.9(b)(3) shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil [fol. 37] and gas leasing together with a statement of the stipulations agreed upon for inclusion in leases covering lands which shall remain available for leasing, to insure that all operations under such leases shall be carried out in such manner as will result in the minimum of damage to wildlife resources; that the agreements, as supplemented by maps or plats specifically delineating the lands, will be filed in the appropriate land office, and that:

"Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records." (Sec. 192.9(c).)

Finally, the regulation provides:

"All pending offers or applications heretofore filed for oil and gas leases covering * * * Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b) (3) of this section shall have been completed." (Sec. 192.9(d).)

Thus it was not until the oil and gas leasing regulations were amended on January 8, 1958, that the Kenai National Moose Range was closed to the filing of oil and gas lease offers and the amendment specifically preserved the priorities of all pending offers.

On August 2, 1958, a notice dated July 24, 1958, that an agreement had been consummated, classifying lands within the Kenai Range as to their availability for oil and gas leasing purposes, was published in the Federal Register (23 F. R. 5883). There the Secretary designated those lands within the Range closed to oil and gas leasing. The remaining lands, including all lands involved in the present appeals, were again made subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act, the regulations in 43 CFR, Part 192, and the provisions of the notice. The notice specifically stated:

"Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations."

The notice further provided that lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office and that all lease offers filed in that office on that day and for ten days thereafter would be treated as having been filed simultaneously.

[fol. 38] The agreement and the map were noted on the Anchorage land office records on August 4, 1958, and it was within the ten-day period following August 14, 1958, that the appellants' offers were filed. The appellants were

on notice at the time they filed their offers that if there were offers pending covering the lands included in their offers those offers would receive priority of consideration under that regulation in Part 192 which prohibits the issuance of an oil and gas lease before final action has been taken on any prior offer to lease the land (43 CFR 192.42 (m)), under the specific provisions of the January 8, 1958, amendment of 43 CFR 192.9, and under the specific terms of the notice making a portion of the lands within the Kenai National Moose Range available for oil and gas leasing.

In the circumstances, it was proper to have issued leases based on the pending offers, all else being regular.

The point raised by the appellants as to whether the leases based on the pending offers were properly issued at a rental of twenty-five cents per acre for the first year of the lease terms requires little discussion. The appellants belabor the difference between a suspended offer and a pending offer. They argue that the twenty-five cent rental applies only to those offers which were pending because the land office had not had the opportunity to process such offers and that it can not be applied to those offers on which the land office had been directed to take no action.

The act makes no such distinction. Under the provisions of the Mineral Leasing Act in effect when the prior offers were filed noncompetitive leases were conditioned upon the payment of advance rentals of not less than twenty-five cents per acre per annum. However, section 22 of the act, known as the Alaska Oil Proviso, authorized the Secretary of the Interior to fix the rental covering noncompetitive leases in Alaska and authorized him, in his discretion, to waive the payment of any rental for the first five years of any such leases. By regulation, the Secretary had fixed the rental of noncompetitive leases covering lands in the continental United States at fifty cents per acre for the first lease year and had fixed the rental on non-competitive leases covering lands in Alaska at twenty-five cents per acre (43 CFR 192.80). Section 10 of the act of July 3, 1958, amended section 22 of the Mineral Leasing Act to provide:

"* * * That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field and the royalty payments from production of oil or gas sold or removed from such lands shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant to applications or [fol. 39] offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of twenty-five cents per acre as lease rental for the first year of such leases; but the aforesaid exception shall not apply in any way to royalties to be required under leases which may issue pursuant to offers or applications filed prior to May 3, 1958. * * *

The offers on which the leases questioned in these appeals were based were "filed prior to and were pending on May 3, 1958." Thus they meet the test of the statute. The fact that action on those offers was suspended by the Department did not deprive the offers of their status as pending offers and it can not deprive the offerors of the benefits of the statute.

Accordingly, it was not error to have issued the leases at a rental of twenty-five cents per acre for the first lease year.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F. R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed.

(Sgd) Edward W. Fisher
Deputy Solicitor

97839-61

[fol. 40]

EXHIBIT F TO COMPLAINT

MCCARTY AND WHEATLEY
Counsellors at Law
Walker Building
734 Fifteenth Street, N.W.
Washington 5, D. C.

MEtropolitan 8-5882

Robert L. McCarty
Charles F. Wheatley, Jr.

February 15, 1962

The Honorable Stewart L. Udall
Secretary of the Interior
Washington 25, D. C.

My dear Mr. Secretary:

Enclosed herewith please find a petition for the exercise of your supervisory authority to correct serious errors in the administration of the public land laws pertaining to the Kenai National Moose Reserve, Alaska.

Respectfully submitted,

Charles F. Wheatley, Jr.

CFW:eb

Enclosure

[fol. 41]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D.C.

A-28594

James K. Tallman

Anchorage 044843

Alice P. Tallman

Anchorage 044844

A-28609

Christine Fleischer

Anchorage 044842

William O. Rabourn

Anchorage 044845

Harry B. Cockrum

Anchorage 044846

Bailey E. Bell

Anchorage 044847

James G. Carlson

Anchorage 044848

Michael F. Bierne

Anchorage 044849

James E. O'Malley

Anchorage 044850

A-28619

Waldo E. Coyle

Anchorage 045178

PETITION FOR EXERCISE OF SUPERVISORY
AUTHORITY

The above parties respectfully petition the Secretary of the Interior to exercise his supervisory authority to correct serious errors in the administration of the public land laws entrusted to him by the President and Congress.¹ Petitioners duly appealed to the Secretary objecting to the issuance of oil and gas leases under section 17 of the Mineral Leasing Act, as amended, on lands within the Kenai National Moose Range, Alaska, pursuant to applications by representatives of various major oil companies in 1954 and 1955, prior to the time that the lands were first considered as available for such leasing by Order of Secretary Seaton dated July 24, 1958 (23 F.R. 5883). Petitioners were the first duly qualified applicants for such leases under the procedures for filing of lease offers set forth in the Order of July 24, 1958, their applications filed on or after August 14, 1958. In a purported attempt to exercise the authority of the Secretary, a deputy solicitor of

¹ See 43 C.F.R. § 221.78.

the Department rejected petitioners' appeals to the Secretary and approved the granting of oil and gas leases on lands within the Kenai National Moose Range pursuant to the applications submitted in 1954 and 1955. The petitioners respectfully submit that the Secretary should exercise his supervisory authority on all or any of the following grounds: (1) newly discovered evidence reveals that it was the intent of President Roosevelt in establishing the Kenai National Moose Reserve to close it to disposition under the Mineral Leasing Law, unless opened thereto by order of the Secretary of the Interior; (2) the deputy solicitor lacked authority to decide petitioner's appeals to the Secretary so that there has been no valid decision on the Secretarial level of petitioners' appeals; and (3) the deputy solicitor's purported decision conflicts with other decisions within the Department of Assistant Secretaries—a conflict which the Secretary should resolve in exercise of his supervisory authority for the proper administration of the Department. The grounds will be discussed in order below.

I. NEWLY DISCOVERED EVIDENCE REVEALS THAT IT WAS THE INTENT OF PRESIDENT ROOSEVELT IN ESTABLISHING THE KENAI NATIONAL MOOSE RESERVE BY EXECUTIVE ORDER IN 1941 THAT IT BE CLOSED TO ALL FORMS OF DISPOSITION UNDER THE PUBLIC LAND LAWS, INCLUDING THE MINERAL LEASING LAWS.

The deputy solicitor's purported decision rejecting petitioners' appeals to the Secretary concluded that the Kenai National Moose Range was open to oil and gas leasing at all times on the following grounds:

"The establishment of the Range did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*). This is so because nothing in the withdrawal specifically excludes those lands from the scope of the act. While such lands are open for leasing under the terms of the Mineral Leasing Act in

the sense that offers to lease such lands may be filed, the Secretary of the Interior may, in the exercise of the discretion vested in him by the act, refuse to issue [fol. 43] sue leases covering such reserved areas where the mineral development of the lands might seriously impair or destroy the purpose for which the lands are reserved. *West Central Corporation*, A-28523 (February 2, 1961); *Noel Teuscher et al*, 62 I.D. 210 (1955); *Martin Wolfe*, 49 L.D. 625 (1923)." (Decision of September 1, 1961, p. 2).

A search of the Presidential and Secretarial files at the National Archives pertaining to the establishment of the Kenai National Moose Reserve discloses new evidence which reveals that the lands withdrawn for the Reserve were not intended to be open for acquisition or disposition under *any* of the public land laws, thereby necessarily including the mineral leasing laws. The Reserve was initially proposed by the Fish and Wildlife Service of the Department of the Interior. In a Memorandum for the Secretary dated January 18, 1941, Mr. Gabrielson, Director of the Fish and Wildlife Service, explained the purpose of the withdrawal for the Kenai National Moose Range in clear and unmistakable language:

"The draft proclamation as now drawn differs somewhat from that as considered by the General Land Office in that the strip of land 6 miles wide along the shores of Cook Inlet and Kachemak Bay, which was omitted from the proposed refuge in the first draft, is now included because it would be impossible to administer the refuge with this undefined boundary. The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. *Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale, or other disposition under any of the public land laws applicable to Alaska*

and from classification and lease under the provisions of the acts of July 3, 1926 (44 Stat. 821, 48 U.S.C. Sup. 360-361) entitled 'Act to provide for the lease of public lands in Alaska for fur farming and other purposes', and of March 4, 1927 (44 Stat. 1452, 48 U.S.C. Sup. 471-471o) entitled 'An act to provide for the protection, development, and utilization of public lands in Alaska by establishing an adequate system of grazing livestock thereon.'

[fol. 44] "I recommend that if the action meets with your approval the draft of the proposed proclamation be forwarded to the President." (Emphasis supplied; see Exhibit A attached.)

It would be difficult to imagine any language of intent expressed more clearly—the Reserve in the Director's view, other than the 6 mile strip where the public land laws applicable to Alaska would apply, was to be withdrawn from any "disposition" under "any of the public land laws applicable to Alaska."¹ The final Executive Order issued by President Roosevelt on December 16, 1941 to establish the Reserve, expressly adopted the language proposed and explained by the Fish and Wildlife Service Director:

"By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for study in its natural environment of the practical management of a big game species that has considerable local value,

¹ The *Teuscher* case (62 I.D. 210 (1955)) cited by the deputy solicitor relied extensively on a similar type supporting document in order to construe the meaning of the Executive Order withdrawing lands there involved. See 62 I.D. at 213. Why the deputy solicitor in the present case did not turn to such "legislative history" of the Executive Order establishing the Kenai Moose Reserve is difficult to understand, except for the fact that the files involved had been transferred to National Archives. See also *P & G Mining Co.*, 67 I.D. 217, 219 (1960).

all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and Alaska Game Commission as a refuge and breeding ground for moose

"None of the above-described lands excepting Tps 5N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to [fol. 45] provide for the leasing of public lands in Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska for establishing an adequate system for grazing livestock thereon', 44 Stat. 1452, U.S.C., title 48, secs. 471-4710: Provided, however, That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: . . ." (Executive Order No. 8979, dated December 16, 1941, 6 F.R. 6471; emphasis supplied.)¹

The express intent of the withdrawal to close the lands embraced therein to disposition under the mineral leasing

¹ The distinction in the Executive Order between the lands closed to any disposition under the public-land laws and lands within the reserve but subject to disposition under the public-land laws is important in interpreting subsequent action by the Secretary relating to the Reserve.

laws as one of the applicable public-land laws in Alaska² adopting the clear intent as expressed by the Director of the Fish and Wildlife Service, is further confirmed by the established accepted interpretation of the meaning of the language used in 1941 when the Order was promulgated. The words providing that "None of the . . . lands . . . shall be subject to settlement, location, sale, or entry, or other disposition . . . under any of the public-land laws" had been definitively interpreted at least three times by the United States Supreme Court prior to 1941 as embracing oil lands subject to disposition under either the Mining Laws or the Mineral Leasing Act of 1920.

The first such instance was the leading case of *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), which held that the President by virtue of his inherent power as head of the Executive Branch, could withdraw lands containing oil deposits from location under the then applicable Mining Laws enacted by Congress.¹ In 1909, President Taft withdrew lands by Executive Order using the following language:

" . . . all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws

There was no issue raised in the case but that the language was effective to withdraw the lands involved from mining for oil under the then applicable Mining Laws. In sustaining the President's power to issue the order, the Court relied heavily on custom, noting among the many instances of Executive Orders withdrawing lands from all types of entry under the public-land laws, some

² As of 1941, it was clear that the Mineral Leasing Act of 1920 as amended was part of the public land laws applicable to Alaska. 43 C.F.R. part 51; 43 C.F.R. § 71.1, (1955 edition).

¹ The Supreme Court has also affirmed the President's inherent power to withdraw lands from leasing under the Mineral Leasing Act. *United States ex rel McLennan v. Wilbur*, 283 U.S. 414 (1931); See also *Martin Wolfe*, 49 L.D. 625 (1923).

44 Executive Orders regarding withdrawals for bird and wildlife purposes. (236 U.S. at 470)

The language of the withdrawal order involved in the *Midwest Oil* case is obviously very similar to the language used by President Roosevelt in the Executive Order withdrawal of 1941 establishing the Kenai Moose Reserve.

The second Supreme Court decision predating 1941 interpreting language used in a withdrawal order was *Mason et al v. United States*, 260 U.S. 545 (1923). The case was a suit by the United States to quiet title to oil lands and for an accounting for oil extracted by the defendants. Prior to defendants' development of the lands, they had been withdrawn by an Executive Order of December 15, 1908, stating that "public lands . . . are . . . withdrawn from settlement and entry, or other form of appropriation." The Court held that the validity of the order had been confirmed by the prior *Midwest Oil Co.* case, "where it was held that a similar order, issued in 1909, was within the power of the Executive." (260 U.S. at 553.) In the *Mason* case it was argued that the [fol. 47] words of the order "or other form of appropriation" must be limited to the immediately preceding words of "settlement and entry" thus limiting the scope of the withdrawal to settlements under the Homestead Laws and not embracing the Mining Laws, which involved a "location and development" for oil claims.¹ The Court rejected this argument holding that the words used "or other form of appropriation" certainly embraced the Mining Laws:

" . . . it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, 'or other form of appropriation,' must be read in connection with the specific words 'settlement and entry,' immediately preceding; and that, so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. The words 'settlement

¹ Prior to 1920 oil lands were developed under the Mining Laws.

and entry,' it is said, apply only to the act of settling upon the soil and making entry at a land office; as, for example, under the Homestead Laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this process is not covered by the words 'other form of appropriation,' limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of *construction*, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order, and consequently were prohibited by it." (260 U.S. 553-555)

[fol. 48] Under the holding of the *Mason* case, clearly the words of the 1941 Executive Order establishing the Kenai Moose Reserve withdrawing the lands from "other disposition . . . under any of the public-land laws applicable to Alaska" cannot be limited to applications for "settlement" and only make sense under the ordinary usage of the English language if applicable to other forms of use of public lands under the public-land laws.

In a third case decided just five years prior to 1941, the Supreme Court again confirmed its interpretation of the general language similar to that used in the 1941 Moose Reserve, as withdrawing lands containing oil deposits from rights granted by § 20 of the Mineral Leasing Act of 1920. *Bordieu v. Pacific Western Oil Co.*, 299 U.S.

65 (1936). The lands in question had been withdrawn by the President on December 30, 1910 "from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting use and disposal of petroleum lands". The Court held as follows:

"The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under § 20 of the leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925 The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were 'withdrawn from settlement, location, sale or entry and reserved for classification' Whether a 'classification' of the lands was effected by the order we need not determine since it is clear that they were 'withdrawn' by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privileges of the Act of 1920 that the lands were either withdrawn or classified" (299 U.S. 69-70.)

Thus, in 1941 when the President issued Executive Order No. 8979 establishing the Kenai National Moose Reserve as a wildlife refuge, the words he employed had become words of art under the existing decisions of the Supreme Court interpreting similar withdrawal orders; in every case it had been held that the language withdrew and closed the lands to development under the applicable Mining or Mineral Leasing Laws.¹

¹ That the precise words used in the 1941 order precluding "other disposition . . . under any of the public-land laws applicable to Alaska" may have been ever more carefully selected than required under the broad rulings and interpretations of the Supreme Court cases may be seen from the analysis of prior Interior decisions in *Noel Teuscher et al.*, 62 I.D. 210 (1955). *Teuscher* referred to several such decisions which were prior to the Supreme Court's ruling in *Mason et al. v. United States*, *supra*, and obviously superseded by it. In an opinion dated September 30, 1921 (48 L.D. 459) the Solicitor held that a reservation of lands of the United States "... from entry, location or other disposal, under the laws of the United States" did not remove the reserved lands from leasing

The subsequent action by the Department with respect to the Kenai National Moose Reserve up to the purported decision by the deputy solicitor rejecting petitioners' appeals is consistent only with the clear interpretation developed above that the Range was closed to oil and gas leasing under the Mineral Leasing Act.

In Public Land Order 487 of June 16, 1948 (13 F.R. 3462), the Secretary withdraw from "settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation" certain lands among which were the lands previously withdrawn by Executive Order 8979 of December 16, 1941 establishing the Moose Reserve. The order specifically provided that "this order shall take precedence over, but shall not modify . . . the [fol. 50] reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941 . . ." Public Land Order 1212 of September 9, 1955 (20 F.R. 6795) (1) revoked in its entirety Public Land Order 487 of June 16, 1948 and (2) provided that certain lands within the excepted area of the Moose Reserve (see *supra*, p. 5 and p. 5 note 1) should *thereafter* be subject to mineral leasing. It stated as follows:

"6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-

under the Mineral Leasing Act because a lease is not an "entry, location or other disposal". Similarly in *Amerman v. Mackenzie*, 48 L.D. 580 (1922) the Department held that a permit under the leasing act is not an "entry, or an appropriation of land with a view to the acquisition of title thereto . . ." The words used in the 1941 Executive Order creating the Kenai Moose reserve overcome both of these two limitations for they withdrew the lands not from "disposal" or "appropriation" but from "*other disposition . . . under any of the public-land laws applicable to Alaska.*" Thus the 1941 Order is clear and unambiguous. The closing of the Moose Reserve lands to oil and gas leasing thereunder, especially as interpreted in the newly discovered substantiating documents, is completely consistent with the analysis of the *Teuscher* case involving an Executive Order not containing such broad language. *Accord*, see *P & G Mining Co.*, 67 I.D. 217 (1960).

land laws, *including the mineral-leasing laws*, as follows:

“(a) As to the lands described in paragraph 4 (a), at 10:00 a.m. on the 126th day after the date of this order.” (Emphasis supplied.)

Public Land Order No. 1212 was immediately amended on October 14, 1955 (20 F.R. 7904) to eliminate the provision for leasing under the “mineral leasing laws:

“Paragraphs No. 6 and 7 of Public Land Order No. 1212 of September 9, 1955, appearing at Doc. 55-7464 in 20 F.R. 6795 of the issue of September 15, 1955, are hereby amended by deleting therefrom the phrases ‘including the mineral leasing laws’, ‘including applications under the mineral leasing laws’, and ‘including leasing under the mineral leasing laws’, wherever they appear, and by adding after the words ‘mining locations’ in the last sentence of paragraphs 6 and 7 of the order the words ‘for non-metalliferous minerals.’”

From this it is clear that the Department of the Interior did not intend to open the Moose Range, or certainly that part covered by Public Land Order No. 487, to mineral leasing applications. If, as the deputy solicitor states (note 4, page 3, Decision of September 1, 1961), Public Land Order 1212 applied only to the excepted land in the original 1941 Moose Reserve originally open to settlement, location, sale or entry, so that the amendment of October 14, [fol. 51] 1955 was necessary since these lands were always open to mineral leasing, it follows that no amendment would have been necessary if Public Land Order 1212 applied to Moose Range lands not within the excepted area. On such lands, as clearly revealed by paragraphs No. 6 and 7 of Public Land Order No. 1212, leasing was closed until and unless specifically opened by the Secretary.

The Interior Regulations in effect in 1955 pertaining to oil and gas leases on wildlife refuge lands at no place state that all such refuges are open to oil and gas leasing.

In fact of the numerous refuges in existence throughout the United States, the Executive Orders under which they were created varied considerably in their terms as to whether oil and gas leasing is permissible. For example Executive Order 9167 of May 19, 1942 (F. R. Doc. 42-4631) establishing the Halfbreed Lake National Wildlife Refuge, Montana, and Executive Order 9166 of May 19, 1942 establishing the Lamesteer National Wildlife Refuge (7 F.R. 3767) contain no provision at all withdrawing the lands from "settlement, location, sale, or entry, or any other disposition . . . under any of the public-land laws" as contained in the Kenai National Moose Reserve Executive Order. Thus the provisions of the Interior Regulations in existence in 1955 pertaining to leases within wildlife refuge lands, setting certain conditions for the issuance of leases therein, pertain only to those refuges which by their terms are open to such leasing. (43 C.F.R. § 192.9, 1955 Ed.)

The amendment of December 2, 1955 (20 F.R. 9009) to the regulation relating to the leasing for oil and gas purposes of wildlife refuge lands makes it crystal clear that the lands within the Kenai National Moose Reserve involved in the present petition were closed to oil and gas leasing. Appendix B to the amendment entitled "Fish and Wildlife Service Lands Available for Leasing Under a Satisfactory Development and Operating Plan" did not embrace the lands in the Kenai Moose Reserve involved in the present action. Thus those lands remained closed to [fol. 52] oil and gas leasing, in addition to the lands listed in Appendix A previously open to leasing by the terms of their withdrawal orders which were to be thereafter closed for future leasing. ~~There was no reason to list the Kenai Moose Reserve in Appendix A, because it was closed by the very terms of its establishing order.~~

On January 8, 1953, the regulation involving oil and gas leasing in general on wildlife refuges was extensively amended (23 F.R. 227; 43 C.F.R., 1959 Supp., 192.9). The first paragraph of the amendment made it clear that only certain of the existing refuges were open to mineral leasing by the terms of the orders establishing them:

§ 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands—(a) Definitions—(1) Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife purposes is vested in the United States Fish and Wildlife Service *even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.*" (Emphasis supplied.)

Under the definitions established in the amendment, it was not clear whether the Kenai National Moose Reserve which was described in the 1941 Executive Order as a "refuge" and under which, by the terms of the "Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211," expressly mentioned in the 1941 Order covered all wildlife, was a "wildlife refuge land" or an "Alaska wildlife area." Assuming it to be the latter, then the effect of the January 8, 1958 amendment to the general regulation was to permit for the first time the opening of the Moose Reserve for oil and gas leasing, but only under the restrictive conditions set forth in the regulation.¹

[fol. 53] The regulation expressly provided:

"Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records." (Sec. 192.9(c).)

Section 192.9(d) of the 1958 amendment provided as follows:

"(d) *Suspension of pending applications.* All pending offers or applications heretofore filed for oil and

¹ It is clear that the January 8, 1958 general amendment to the regulations and the specific order of August 2, 1958 (dated July 24, 1958) (23 F.R. 5883) since issued by the Secretary were effective to amend the 1941 Order. *Wilbur v. U.S.* 46 F. 2d (1930).

gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b) (3) of this section shall have been completed."

The suspensions referred to were those of August 31, 1953 and early 1956, which were not directed at the Kenai National Moose Reserve, but all wildlife reserves in the country. Hence the suspensions were legally applicable only to those reserves which by the terms of the withdrawal orders were open to oil and gas leasing. Since the Kenai National Moose Reserve by its terms was closed to any such disposition under the mineral leasing laws, the broad general suspensions of 1953 and 1956 referred to in section 192.9(d) of the 1958 amendment had no applicability to it.

That the lands within the Kenai National Moose Reserve were closed until the procedures established by the January 8, 1958 amendment could be effectuated to open certain portions of it subject to restrictive conditions, is clear from the precise order issued August 2, 1958 with respect to the Reserve by the Secretary of the Interior (23 F.R. 5883). The Order expressly provided:

"Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:" (Emphasis supplied.)

The Order expressly provided further:

[fol. 54] "... lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8."

Petitioners filed their offers to lease in accordance with the above provision on that portion of the Moose Reserve opened as a consequence of the Secretary's regulations of January 8, 1958 and order of August 2, 1958. They have the priority accorded thereby, and their lease applications should have been granted as the first qualified applicants. *McKay v. Wahlenmaier*, 226 F. 2d 35, 43 (D.C. Cir. 1955); *McKenna v. Seaton*, 25 F. 2d 78 (D.C. Cir. 1958).¹

The provision in the order of August 2, 1958 (23 F.R. 5883) stating that—

“Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.”

can only apply to areas opened originally to oil and gas leasing. As seen with respect to the Kenai National Moose Reserve, this could apply only to the excepted area which the 1941 Executive Order expressly provided was subject to the “public-land laws applicable in Alaska.” (See p. 5 *supra*, and note 1, page 5.)

Thus, it appears that the history of regulations adopted by the Secretary pertaining to the Kenai National Moose Reserve are consistent only with the construction of the withdrawal order creating the Reserve as shown in the [fol. 55] supporting documents that it was to be closed to all disposition under the public-land laws applicable in Alaska, thus in terms excluding oil and gas leasing. The “decision” by the deputy solicitor rejecting petitioners’ appeals to the Secretary and approving the granting of oil and gas leases on lands within the Kenai National Moose Range pursuant to applications submitted in 1954 and 1955 while the Range was closed was not only erroneous, but void as lacking authority.

¹ See R. S. Prows, 66 I.D. 19 (1959).

II. THE DEPUTY SOLICITOR LACKED AUTHORITY TO DECIDE PETITIONERS' APPEALS TO THE SECRETARY.

The purported decision by the deputy solicitor of petitioners' appeals to the Secretary of the Interior, states that it was authorized as follows:

"Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed." (Decision, p. 7)

However, the order of delegation of authority cited by the deputy solicitor limits the delegation as follows:

"200.2.1 *General limitations.*

"A. Nothing in this Delegation Series empowers any officer or employee of the Department to exercise authority which the Secretary may not redelegate. For example, the Secretary may not redelegate the authority

"B. In certain instances, the provisions of a delegation of authority to the Secretary confine re delegation to specified officers. In those cases there is a re delegation of authority in this Delegation Series only if the authority is expressly mentioned. For example . . . the authority under Executive Order 10355, to withdraw or reserve certain lands, which may be redelegated only to the Under Secretary and the Assistant Secretaries, is expressly mentioned in 210.1.1 and 1.2.

"210.1.1 *Under-Secretary.*

"A. The Under Secretary is authorized to:

[fol. 56] "(3) Exercise the authority delegated to the Secretary by Executive Order 10355, relating to the withdrawal or reservation of certain lands by the issuance of public land orders.

"B. The Under Secretary may not redelegate the authority delegated to him by subpar. A.

"210.1.2 Assistant Secretaries.

The Assistant Secretaries, as used in the Delegation Series, include the Assistant Secretary—Mineral Resources, the Assistant Secretary—Public Land Management, the Assistant Secretary—Water and Power Development, but does not include the Assistant Secretary for Fish and Wildlife and Administrative Assistant Secretary.

"A. The Assistant Secretaries severally are authorized to: . . . (2) Exercise the authority delegated to the Secretary by Executive Order 10355, relating to the withdrawal of reservation of certain lands by the issuance of public land orders."

The Kenai Moose Range was created pursuant to the general power of the President to withdraw lands for wildlife refuges. 37 Ops. Atty. Gen. 415 (1934); 37 Ops. Atty. Gen. 502 (1934); cf. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Power to revise or change the terms of Executive Order No. 8979 of December 16, 1941 (6 F.R. 6471) creating the Reserve and precluding any disposition thereof under the Mineral Leasing laws (see I, *supra*, pp. 2-15) was delegated to the Secretary of the Interior (and the Under Secretary or Assistant Secretaries) by the President in Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831), which provides as follows:

"Section 1. (a) Subject to the provisions of subsections (b), (c), and (d) of this section, I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." (Emphasis supplied.)

[fol. 57] Petitioners' appeals to the Secretary of the Interior for the issuance of leases could have been rejected only if the Kenai National Moose Reserve was validly open to oil and gas leasing in 1954 and 1955 when the applications by representatives of major oil companies were filed. The purported decision by the deputy solicitor retroactively opening the Reserve by approving the issuance of these leases was unauthorized because the Secretary has not delegated his authority to modify or revoke withdrawals and reservations to a deputy solicitor. Thus petitioners' appeals can only properly be decided by the Secretary, the Under Secretary, or an Assistant Secretary, as specified in order delegating authority within the Department (24 F.R. 1348, *supra*).¹ The deputy solicitor's ruling that the Reserve was open to mineral leasing prior to the Secretary's orders of January 8, 1958 and August 2, 1958, *supra*, was beyond his delegated authority. As a consequence there has been no valid decision on the Secretarial level of petitioners' appeals. The omission should be corrected by an exercise of supervisory authority by the Secretary.

III. THE DEPUTY SOLICITOR'S PURPORTED DECISION CONFLICTS WITH OTHER DECISIONS BY ASSISTANT SECRETARIES WITHIN THE DEPARTMENT—A CONFLICT WHICH THE SECRETARY SHOULD RESOLVE IN EXERCISE OF HIS SUPERVISORY AUTHORITY FOR THE PROPER ADMINISTRATION OF THE DEPARTMENT.

In *P & G Mining Co.*, 67 I.D. 217 (1960) an Assistant Secretary reached a conclusion diametrically opposite from

¹ With respect to an appeal involving lands in the southern part of the Kenai Moose Reserve, the matter was decided by an Assistant Secretary. *Richard K. Todd et al*, A-28090, October 30, 1961. While the matter was not analyzed by Assistant Secretary Carver in that decision, many of the problems faced by the closing of the southern part of the Reserve by the August 2, 1958 order are removed if the entire Reserve, as shown by the newly discovered evidence submitted in I, *supra*, pp. 2-15, was intended to be closed until opened by the Secretary.

[fol. 58] that of the deputy solicitor in interpreting a withdrawal order establishing the Imperial National Wildlife Refuge by Executive Order 8685 dated February 14, 1941 (6 F.R. 1016). The Imperial Refuge, created the same year as the Kenai National Moose refuge, was not as explicit as the Moose order in withdrawing lands from mineral disposition. The Imperial order read as follows:

"By virtue of the authority vested in me as President of the United States, and by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497, it is ordered that all lands owned by the United States within the following described areas, more or less, in Yuma County, Arizona, and Imperial County, California be, and they are hereby reserved and set apart, subject to valid rights, for the use of the Department of the Interior as a refuge and breeding ground for migratory birds and other wildlife . . ."

There was no language at all in the Imperial order as contained in the Kenai order which explicitly reserved the lands from any "disposition under any of the public-land laws applicable in Alaska." Nevertheless, the Assistant Secretary ruled that the Imperial order by its very terms was intended to reserve the lands from disposition under the mining laws, even though the act of June 25, 1912 as amended by the act of August 24, 1912 cited in the order expressly permitted entry of such withdrawals for the mining of metalliferous minerals:

"In this instance, the withdrawal was made in the exercise of the President's inherent power, as evidenced by the fact that a permanent refuge was established, although the authority conferred by the statute is also cited. This seems to have been a fairly common practice for a number of years. It is significant that in some instances wherein both the President's inherent authority and the statutory authority are relied upon there is a specific provision that mining activities shall not be prohibited. *This indicates clearly that a full exercise of Presidential authority*

was intended in every instance wherein such language was not included in the withdrawal order. Accord- [fol. 59] *ingly, it cannot be supposed that a reference to the act of June 25, 1910, in the withdrawal order was intended to effect or has effected consent or acquiescence in the continuation of mining activities in the lands included in the Imperial National Wildlife Refuge."* (67 I.D. at 219-220; emphasis supplied.)

Since the Kenai Moose Reserve included no such express language *permitting* disposition under the mineral leasing laws, the ruling of the *P & G Mining Co.* case requires a conclusion that the Moose order was a full exercise of Presidential authority to withdraw the lands, and effectively withdrew the lands from the operation of the mineral leasing laws. Cf. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); *Wilbur v. United States*, 46 F. 2d 217, 220 (D.C. Cir. 1930).

Another current case directly conflicting with that of the deputy solicitor is that of *Frank M. McGinley*, 67 I.D. 194 (1960). In *McGinley* the lands sought by an applicant for an oil and gas lease had been withdrawn by a Public Land Order "from all forms of disposition, including the mineral leasing laws" (67 I.D. at 195). The case holds that the President has inherent authority to so withdraw the lands which was delegated to the Secretary of the Interior by Executive Order 10355:

"Furthermore, the Secretary, acting under the authority delegated to him by the President in Executive Order 10355 of May 26, 1952, can withdraw public land from all forms of appropriation under the public land laws, including the mining and mineral leasing laws" (67 I.D. at 197).

Accordingly, the lands were held not available for leasing under the Mineral Leasing Act. The case is a recognition that the word "disposition" expressly used in the Kenai Moose Range order "includes" leasing under the mineral leasing laws. Again the decision conflicts with that of the deputy solicitor with respect to petitioners' appeals.

CONCLUSION

For the three reasons discussed above, or any of them, [fol. 60] petitioners respectfully request the Secretary to exercise his supervisory powers to decide petitioners' appeals and correct the serious administrative discrepancies revealed herein. Under the proper interpretation of President Roosevelt's Executive Order of 1941 establishing the Kenai National Moose Reserve as revealed in the newly discovered evidence submitted herewith, the Kenai Moose Reserve was closed to oil and gas leasing until expressly opened under specific conditions by the Secretary's order in 1958. The leases so issued must be cancelled and petitioners' applications filed pursuant to the specific instructions by the Secretary, approved.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D.C.

Attorney for petitioners

[fol. 61]

In Reply Refer to

LA - EO
Alaska
KenaiAddress only the
Director, Fish and Wildlife ServiceFile Copy
Surname:
[Illegible]UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
WASHINGTON

January 18, 1941.

MEMORANDUM for the Secretary.

In accordance with your instructions, there is transmitted herewith draft of a proposed proclamation to establish the Kenai National Moose Range in Alaska.

The proposed range is to be established on an area of land and water lying on the northwest portion of the Kenai Peninsula comprising approximately 2,700,000 acres. The purpose of the proposed proclamation is to reserve this area for the use of the Department of the Interior as a refuge and breeding ground for moose. This area is the natural habitat for these animals and its location affords an opportunity for effective administration.

A draft of a form of proposed proclamation has been considered by the General Land Office and returned without endorsement because the War Department has made a request for withdrawal for use as an aerial gunnery range of a tract embracing the entire northern part of the proposed moose range, which is described as follows:

Beginning at a point known as Point Possession, in Lot No. 2, Section 17, Township 11 North, Range 6 West, S. M.; thence southwest along the South shore of Cook Inlet, a distance of approximately 40 miles, to Boulder Point; thence due South a distance of approximately 14 miles to a point approximately 2

miles North of Kenai Village; thence due East, a distance of approximately 19 miles to the Moose River; thence up the Moose River, a distance of approximately 10 miles; thence in a Northeasterly direction to the mouth of Mystery Creek; thence down the Chickaloon River to its mouth; thence Northwest along the South shore of Chickaloon Bay to the point of beginning, excluding the Nicoli Indian Village at Point Possession and the Matthison Village at the mouth of Chickaloon River, as well as the trail leading from the mouth of the Moose River to the Village of Kenai.

The area described above includes what, in my opinion, is the best part of the moose range and I would like to see it reserved for refuge purposes rather than an aerial gunnery range, and would like to discuss with you the possibility of modifying or relocating the proposed aerial gunnery range.

The draft proclamation, as now drawn differs somewhat from that as considered by the General Land Office in that the strip of land 6 miles wide along the shores of Cook Inlet and Kachemak Bay, which was omitted from the proposed refuge in the first draft, is now included because it would be impossible to administer the refuge with this undefined boundary. The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale, or other disposition under any of the public land laws applicable to Alaska and from classification and lease under the provisions of the acts of July 3, 1926 (44 Stat. 821, 48 U.S.C. Sup. 360-361) entitled "Act to provide for the lease of public lands in Alaska for fur farming and other purposes", and of March 4, 1927 (44 Stat. 1452, 48 U.S.C. Sup. 471-471c) entitled "An act to provide for the protection, development, and utilization of public lands in

Alaska by establishing an adequate system of grazing livestock thereon".

It is further the intention that the proclamation will leave with you as Secretary of the Interior, the direction of the use and the regulation of the area so that the moose thereon may be conserved and at the same time properly controlled.

I recommend that if the action meets with your approval the draft of the proposed proclamation be forwarded to the President.

[Illegible]

Director.

Enclosure 2300489.

[fol. 63]

EXHIBIT G TO COMPLAINT

In Reply Refer to:

[SEAL]

A-28594

A-28609

A-28619

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

April 25, 1962

Mr. Charles F. Wheatley, Jr.
Attorney at Law
1203 Walker Building
Washington 5, D. C.

Dear Mr. Wheatley:

We have considered the petition for the exercise of supervisory authority by the Secretary of the Interior in the matter of the Departmental decision of September 1, 1961, in *James K. Tallman et al.* (A-28594, A-28609, and A-28619), involving certain oil and gas lease offers on lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, enclosed with your letter of February 15, 1962.

We find nothing therein which would warrant any change in the decision of September 1, 1961.

Accordingly, the petition is denied and the decision of September 1, 1961, will stand as the final decision of the Secretary in the matter.

Sincerely yours,

/s/ Edward W. Fisher
Deputy Solicitor

[fol. 64]

[fol. 65]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

DEFENDANT'S MOTION TO DISMISS—Filed July 18, 1962

The defendant moves the Court to dismiss this action because it is barred by the 90-day statute of limitations, Act of September 2, 1960, 74 Stat. 790, 30 U.S.C. § 226-2, and this fact is apparent from the complaint and the exhibits attached thereto.

Respectfully,

/s/ Herbert Pittle

Attorney, Department of
Justice

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO DEFENDANT'S MOTION TO DISMISS—Filed
August 23, 1962

Plaintiffs, by their attorney, move the Court for summary judgment pursuant to Rule 53 of the Federal Rules of Civil Procedure, in accordance with the relief sought in the complaint. This motion is based on the following grounds:

[fol. 66] 1. Defendant's motion to dismiss constitutes an admission of all the material facts recited in the complaint pertaining thereto.

2. There is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law.

3. A statement of the material facts as to which there is no genuine issue is set forth in a memorandum of Points and Authorities which is annexed hereto in support of this motion for summary judgment.

For his response to defendant's motion to dismiss, the plaintiffs adopt the Memorandum of Points and Authorities submitted herewith.

Respectfully submitted,

/s/ Charles F. Wheatley, Jr.
CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.

Attorney for Plaintiffs

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

STATEMENT UNDER RULE 9[h] TO ACCOMPANY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT—Filed August 23, 1962

In compliance with Rule 9[h] the plaintiffs submit the following statement of material facts as to which they contend there is no genuine issue.

1. The lands involved in this case are located within the Kenai National Moose Reserve, Kenai Peninsula, Alaska, established by Executive Order No. 8979 (6 F.R. 6471) [fol. 67] of December 16, 1941 by President Roosevelt. The Executive Order provided that none of the lands within the Reserve, with certain exceptions,

"... shall be subject to settlement, location, sale or entry, or other disposition ... under any of the public land laws applicable to Alaska ..."

By Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831) the President delegated to the Secretary of the Interior his power to modify the terms of outstanding withdrawals and reservations. Under Departmental Regulations (24 F.R. 1348, Departmental Manual §§ 200.2.1, 210.1, 210.1.2, 210.2.2A(4)(a)) the Secretary of the Interior has redelegated this power to the Under Secretary and certain Assistant Secretaries but has denied this power to the Solicitor or Deputy Solicitor of the Department.

2. On July 24, 1958 the Secretary of the Interior issued an order (published in the Federal Register of August 2, 1958, 23 F.R. 5883) relating to the Kenai National Moose Reserve which expressly provided:

"Closed Area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:" (Emphasis supplied.)

The lands listed as "not opened" were in the southern part of the Reserve. As to lands in the northern part of the Reserve, wherein the lands involved in this case lie, the order provided:

"... lease offers ... will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease [fol. 68] offers filed in that office on that day and until 10 A.M., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8."

The Management and map were noted on the records on August 4, 1958, so that the lands involved in this case first became open to lease offers thereunder on August 14, 1958.

3. Plaintiffs duly filed their respective offers to lease on or after August 14, 1958 in accordance with the procedure specified in the Secretary's Order of July 24, 1958, *supra*. Their applications were the first so received. On September 4, 1958 the Bureau of Land Management issued a "Notice of Public Drawing" to "determine priorities between simultaneously filed oil and gas lease offers," which specifically included plaintiff's applications. Subsequent to the drawing, plaintiffs remained the first lease applicants for the respective lands of those applicants filing after August 14, 1958 under the order of July 24, 1958.

4. However, the Anchorage Land Office rejected the plaintiffs' lease offers in October, 1959, on the ground that they conflicted with leases issued during the fall of 1958, based on offers filed between October 15, 1954 and January 28, 1955.

5. Plaintiffs duly appealed to the Director of the Bureau of Land Management where their appeals were denied in decisions rendered in July, 1960. Subsequently, plaintiffs duly appealed to the Secretary of the Interior. The Secretary never acted upon the appeals. Instead a deputy solicitor of the Department in an opinion dated [fol. 69] September 1, 1961 rejected plaintiffs' appeals on grounds not previously asserted by the Bureau of Land Management. The deputy solicitor concluded that the lands within the Kenai National Moose Reserve withdrawn by Executive Order No. 8979 of December 16, 1941 by the President were open to oil and gas leasing during 1954 and 1955 prior to the time that the Secretary of Interior had opened the lands by his order of July 24, 1958. The deputy solicitor confirmed the granting of leases within the Reserve based on the 1954 and 1955 offers, and for this reason rejected plaintiffs' offers.

6. Subsequent to the opinion by the deputy solicitor, plaintiffs duly filed a petition for exercise of supervisory authority with the defendant Secretary of the Interior pursuant to Departmental procedures for further consideration of the matter on the grounds (1) that newly discovered evidence substantiates the express language of the Executive Order that it was the intent of President Roosevelt in establishing the Kenai National Moose Re-

serve by Executive Order in 1941 that it be closed to oil and gas leasing under the Mineral Leasing Act; (2) that the deputy solicitor lacked authority to reject plaintiffs' appeals to the Secretary; and (3) that the deputy solicitor's purposed opinion conflicts with other decisions by Assistant Secretaries and other officers within the Department—a conflict which only the Secretary could resolve.

7. In a decision dated April 25, 1962, again signed by [fol. 70] the same deputy solicitor, plaintiffs' petition for exercise of supervisory authority, although considered on its merits, was denied.

8. Plaintiffs filed their present action in this court on June 8, 1962.

Respectfully submitted:

/s/ Charles F. Wheatley, Jr.
CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1882-62

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—
Filed September 4, 1962

The defendant moves the Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the Rules of this Court, on the grounds that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law; that the action is barred by the statute of limitations, 30 U.S.C. 226-2, and that the complaint fails to state a claim for which relief can be granted.

This motion is based upon the complaint and its attached exhibits, referred to as appendices in the complaint, and the defendant's statement and counterstatement under Rule 9(h) of material facts as to which there is no genuine issue.

Respectfully,

/s/ Herbert Pittle

Attorney, Department of
Justice

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

DEFENDANT'S STATEMENT AND COUNTERSTATEMENT UNDER RULE 9(h) OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed September 4, 1962

Pursuant to Rule 9(h) of the Rules of this Court, the defendant adopts as his statement of material facts the plaintiffs' statement of material facts, except those which have been controverted in defendant's response to plaintiffs' statement.

Respectfully,

/s/ Herbert Pittle

Attorney, Department of
Justice

Attorney for Defendant

[fol. 72]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF
MATERIAL FACTS—Filed September 4, 1962

The defendant controverts the following assertions contained in the plaintiffs' statement under Rule 9(h) [inadvertently referred to as "Rule 9(1)"], accompanying plaintiffs' motion for summary judgment:

1. Defendant controverts the statement in the last sentence of paragraph 1 that the Secretary of the Interior " * * * has denied this power [referring to powers delegated] to the Solicitor or Deputy Solicitor of the Department."

2. Defendant controverts the statement in the last sentence of paragraph 2, to the effect that the lands involved in this case first became open to lease offers on August 14, 1958.

3. Defendant denies the statement in paragraph 3 that the plaintiffs' applications were the first applications received for the lands involved in this case.

4. Defendant controverts the assertion in paragraph 5 that the Secretary of the Interior never acted upon the appeals filed by the plaintiffs.

5. Defendant controverts the statement in paragraph 6 that the plaintiffs "duly" filed a petition for exercise of supervisory authority with the defendant, pursuant to departmental procedure.

All of the assertions in the plaintiffs' statement under Rule 9(h) which are controverted by the defendant, as

set forth above, constitute plaintiffs' conclusions and arguments [fol. 73] and are not statements of fact.

Respectfully,

/s/ Herbert Pittle
HERBERT PITTLE
Attorney, Department of
Justice
Attorney for Defendant

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

MEMORANDUM—October 16, 1962

This matter having come before the Court on the 9th day of October, 1962 on the motions for Summary Judgment of Plaintiffs and Defendant, respectively, in the above entitled matter, the Points and Authorities submitted therewith, the respective statements of opposition filed thereto and the arguments advanced on hearing, and the Court having fully considered same and being fully advised in the premises, the Court concludes, there being no genuine issue of material fact, that the motion for summary judgment raised by the Defendant Udall should be and is, hereby granted and accordingly, the motions of the Plaintiffs Tallman, et al. for summary judgment should be, and are, hereby denied, except that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations should not form part of the basis for the [fol. 74] granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied.

Counsel for the Defendant Udall will prepare and submit an appropriate order in conformity with the Court's ruling.

(signed) Charles F. McLaughlin
Judge

October 16, 1962

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62

* * * *

JUDGMENT—November 1, 1962

This case having come on for hearing on plaintiffs' motion for summary judgment and on defendant's motions to dismiss and for summary judgment, and the Court having heard argument of counsel and considered the material in support of the motions, and it appearing that there is no genuine issue of fact and that the defendant is entitled to judgment as a matter of law,

WHEREFORE, IT IS ORDERED as follows:

1. Defendant's motion for summary judgment is granted.

2. Defendant's motion to dismiss is denied.

[fol. 75] 3. Plaintiffs' motion for summary judgment is denied. <

4. Judgment is hereby entered against the plaintiffs and in favor of the defendant and the complaint is dismissed.

Dated, this 1st day of November, 1962.

(signed) Charles F. McLaughlin
Judge
United States District
Court

* * * *

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1852-62
* * *

NOTICE OF APPEAL—Filed December 31, 1962

Notice is hereby given this 31st day of December, 1962, that James K. Tallman, Alice P. Tallman, Christine Fleischer, William O. Rabourn, Harry B. Cockrum, Bailey E. Bell, James G. Carlson, Michael F. Beirne, James E. O'Malley and Waldo E. Coyle, plaintiffs, hereby appeal to the United States Court of Appeals for the District of Columbia from that part of the judgment of this Court granting defendant's motion for summary judgment and denying plaintiffs motion for summary judgment entered on the 1st day of November, 1962 in favor of defendant, Stewart L. Udall against said plaintiffs.

/s/ * * *

CHARLES F. WHEATLEY, JR.
1203 Walker Building
Washington 5, D. C.

Attorney for plaintiffs
* * *

[fol. 76]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File Endorsement Omitted]

No. 17,598

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Mr. Charles F. Wheatley, Jr., with whom Mr. Robert L. McCarty was on the brief, for appellants.

Mr. Edmund B. Clark, Attorney, Department of Justice, with whom Assistant Attorney General Clark, Messrs. S. Billingsley Hill and Herbert Pittle, Attorneys, Department of Justice, were on the brief, for appellee. Mr. Roger P. Marquis, Attorney, Department of Justice, also entered an appearance for appellee.

OPINION—Decided September 19, 1963

Before WILBUR K. MILLER, BASTIAN and MCGOWAN,
Circuit Judges.

BASTIAN, *Circuit Judge*: This is an appeal from summary judgment of the District Court in favor of the Secretary of the Interior in an action to review his decision [fol. 77] rejecting appellants' applications for oil and gas leases on land within the Kenai National Moose Range in Alaska.

Since appellants' main attack is on the Secretary's authority to draw various historical conclusions, the chronology of the creation of the moose range and its opening for oil and gas leasing is necessary.

The Kenai National Moose Range was established by Executive Order No. 8979¹ of December 16, 1941. The order, which covered all but a small part of the subject lands, withdrew and reserved the area for the protection of the Kenai moose and provided that none of the lands:

"shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926 . . . 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927 . . . 44 Stat. 1452, U.S.C., title 48, secs. 471-471o."

Subsequently, Public Land Order No. 487² of June 16, 1948, withdrew the portion of the subject lands excepted by the 1941 Executive Order.

Between October 15, 1954, and January 28, 1955, certain parties filed applications for oil and gas leases on lands covered by the 1941 and 1948 orders. No immediate action was taken on these applications because, in 1953, the Director of the Bureau of Land Management had suspended action on all *pending* oil and gas lease offers until completion of a study of possible changes in policy and regulations related to the issuance of oil and gas leases within wildlife refuges. Ultimately, these parties were awarded leases on the land in question.

In 1955 the Government began to restore the Kenai National Moose Range to certain private acquisition. First, Public Land Order No. 487 was revoked by Public Land

¹ 6 Fed. Reg. 6471.

² 13 C.F.R. 3462. The order stated:

"Subject to valid existing rights, the public lands [described] in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation.

"This order shall take precedence over, but shall not modify . . . the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941. . . ."

Order No. 1212³ of September 9, 1955, which provided initially that a small piece of land (not involved in the present suit) was:

"2. Subject to valid existing rights . . . withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. . ."

The order then proceeded to deal with the remainder of the land restored. After granting preference for homesteading, it provided:

"6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws . . ."

"7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral-leasing laws . . ."

On October 4, 1955, Public Land Order No. 1212 was amended⁴ to delete the provisions for leasing under the [fol. 79] mineral-leasing laws appearing in paragraphs 6 and 7 of the order.

Finally, on January 8, 1958, an amendment to 43 C.F.R. 192.9⁵ provided:

"(b) *Leasing policy and procedure.* * * * (3) As to . . . Alaska wildlife areas, representatives of the

³ 20 Fed. Reg. 6795.

⁴ 20 Fed. Reg. 7904.

⁵ This regulation provided a comprehensive plan for oil and gas leasing of wildlife refuge lands, including the Kenai National Moose Range.

appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. . . .

"(4) The remaining lands . . . not closed to oil and gas leasing will be subject to leasing. . . .

"(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b) (3) of this section shall be published in the FEDERAL REGISTER. . . . The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management. . . . Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records."

The Bureau of Land Management and the Fish and Wildlife Service concluded their agreement and it was approved by the Secretary of the Interior. The order of the Secretary was published on August 2, 1958⁶ designating the lands in the Moose Range which were not subject to oil and gas leasing, and providing that the balance of the lands within the Range were subject to the filing of oil and gas lease offers. The order stated:

"Offers to lease covering any of these lands which have been pending and upon which action was suspended [fol. 80] will now be acted upon and adjudicated in accordance with the regulations."

The order also stated that all lease offers filed within ten days after the date established by regulations 43 C.F.R. 192.9 for acceptance for filing would be treated as simultaneously filed, and further:

"The priorities of all offers which conflict in whole or in part will be determined in accordance with the

⁶ 23 Fed. Reg. 5883.

procedures outlined in the regulation 43 C.F.R. 259.8." ⁷

On or after August 14, 1958, appellants filed their respective offers to lease⁸ pursuant to § 17 of the Mineral [fol. 81] Leasing Act, as amended, 30 U.S.C. § 226 (Supp. III, 1958).

Some time after appellants' applications had been filed, the Department of the Interior, without notice to appellants, issued leases for the lands in question to the representatives of major oil companies based on offers filed by them between October 15, 1954, and January 28, 1955, as above stated.

On September 4, 1959, a little more than a year after the filing of appellants' offers, a public drawing was held to determine the priorities between simultaneously filed oil and gas lease offers pursuant to the provisions of 43 C.F.R. 295.8. Appellants prevailed in this public draw-

⁷ 43 C.F.R. 295.8: "*Processing of simultaneous applications.* All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. . . .

* * *

"(b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

"(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations."

⁸ All of the appellants, except Waldo E. Coyle, filed their offers for land covered by Executive Order No. 8979 of December 16, 1941. Coyle filed an offer for land originally excluded by that order but subsequently included in Public Land Order No. 487 of June 16, 1948. The land covered by the 1948 order was opened to oil and gas leasing by Public Land Order No. 1212 of September 9, 1955, as modified by the amendment of October 14, 1955. The applicants awarded priority over Coyle filed their offers prior to Order No. 1212, so the question presented by Coyle is whether Order No. 487 closed the land to oil and gas leasing.

ing, in which the oil companies were not represented. But their victory was short-lived, for their lease offers were rejected by the Anchorage Land Office on the grounds that they conflicted with the leases issued the previous fall.

Appellants duly appealed to the Director of the Bureau of Land Management, where their appeals were denied in decisions rendered in July, 1960. Appeals from these decisions were taken to the Secretary of the Interior and were rejected by a deputy solicitor of the Department in an opinion dated September 1, 1961, granting leases within the Range based on the 1954 and 1955 offers. A petition for the exercise of supervisory authority by the Secretary of the Interior was filed on February 15, 1962. This petition was denied *on the merits* on April 25, 1962.

Thereafter, and on June 8, 1962, appellants filed this suit in the District Court against the Secretary of the Interior. The Secretary first filed a motion to dismiss based on the ninety-day statute of limitations contained in 30 U.S.C. § 226-2 (Supp. III, 1958). Then both sides moved for summary judgment. The District Court granted the motion of the Secretary for summary judgment and denied the motions of appellants for summary judgment [fol. 82] ment, specifically stating that the ground of non-compliance with the statute of limitations did not form a part of his decision, and further specifically denying the Secretary's motion to dismiss based, as stated, on the ninety-day statute of limitations. Appellants appealed to this court on December 31, 1962.

Appellant's principal contention is that the 1941 Executive Order closed to oil and gas leasing the land in the Kenai National Moose Range covered by that directive, and that this land remained closed until it was opened by the amendment of 43 C.F.R. 192.9 in January 1958. They argue that the order prohibits "disposition [of any lands within the Range] (except for fish trap sites) under any of the public-land laws applicable to Alaska," and, since the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, is a "public-land law applicable to Alaska," it follows that oil and gas leasing under that Act is prohibited.

We think the Executive Order clearly did remove the land involved from oil and gas leasing and appellants' contention in this regard is correct. And there is no doubt that the Mineral Leasing Act of 1920 is a public-land law applicable to Alaska.⁹

The Secretary argues, however, that the acts of July 3, 1962, and March 4, 1927, specifically included in the 1941 order, are also public-land laws applicable to Alaska, and that, consequently, the order could not have been designed to include all such public-land laws but only those laws relating to the complete alienation of the title of the United States in the land. The Secretary argues that, since the Mineral Leasing Act does not provide for the alienation of the title of the United States, and since the order did not expressly withdraw the lands from the operation of that Act, the land covered by the 1941 order was open to oil and gas leasing in 1954 and 1955, when the offers conflicting with appellants' offers were filed.

[fol. 83] There are persuasive counter-arguments to the Secretary's contentions. As the deputy solicitor himself noted, the acts specifically included in the Executive Order, unlike the Mineral Leasing Act, are not public-land laws of general applicability throughout the United States but are laws applicable only to Alaska. We think the phrase "public-land laws applicable to Alaska" means those laws of general applicability throughout the country which are made applicable to Alaska by the act of August 24, 1912, 37 Stat. 512, 48 U.S.C. 23, 43 C.F.R. 51.1; otherwise, the order would not have included the two acts specifically mentioned.

The specific exemption for fish trap sites in the order strengthens our conviction. If the order were designed to cover only the total alienation of the interest of the United States, then specification of fish trap sites would be unnecessary, for permission to fish by traps is acquired not by deed but by a license, similar in many respects to a lease. Furthermore, the specific inclusion of one exception in the order indicates that other exceptions should not be implied (as the Secretary urges) but that

⁹ 43 C.F.R. 71.1 (1954).

the prohibition on disposition should be read in an expansive manner.

Appellants make copious reference to the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141, pointing out the similarity between the wording of that statute and the Executive Order of 1941 and the Public Land Order of 1948. Using this evident similarity, they urge that the cases which have construed the Pickett Act to permit the President to withdraw public lands from oil and gas leasing¹⁰ also provide judicial interpretation of the 1941 and [fol. 84] 1948 orders. The cases dealing with the Pickett Act certainly are not dispositive of the question before us, but they are not wholly irrelevant since they do indicate that it is more likely that these words were used to provide expansive coverage rather than the narrow coverage the Secretary now urges.

In sum, we hold, as to all appellants other than Coyle, that the lands in the Kenai National Moose Range were closed to oil and gas leases by the terms of the order creating the Range in 1941 until it was opened on August 2, 1958. Accordingly, the leases issued to parties other than those appellants were a nullity because applications therefor were filed prior to the opening of the Range to leasing. While the lands filed on by appellant Coyle present a somewhat different picture from those of the other appellants, no material difference exists between his claim and theirs. The lands on which Coyle filed were originally opened by the 1941 order, but they were closed in 1948 by Order No. 487 and remained closed during the time the offer conflicting with his application was filed. These excepted lands were reopened by Order No. 1212 on September 9, 1955, but no new offers were filed thereafter on the lands covered by the Coyle application. As to the lands filed on by Coyle, we hold that the leases issued to parties other than Coyle were a nullity because applications therefor were filed prior to the opening of the Range to oil and gas leasing.

¹⁰ *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65 (1936); *Wilbur v. United States ex rel. Barton*, 60 App.D.C. 11, 46 F.2d 217 (1930) *aff'd sub nom. United States ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931):

In reversing the Secretary's interpretation of the 1941 order creating the Kenai National Moose Range, we are aware of the discretion granted agencies in the interpretation of statutes and presidential orders in areas committed to their administration. Deference to agencies does not reach the extent of sanctioning irrational agency action, however; nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the gen- [fol. 85] cy's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable. In the case before us the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand.

The Secretary concedes that, if this court determines that any of the orders closed the Moose Range to oil and gas leasing, the only possible defense would be based on 30 U.S.C. 226-2, which provides:

"No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."

Admittedly, appellants commenced this action more than five months after the order of the deputy solicitor, acting for the Secretary of the Interior, was filed. However, on April 25, 1962, the Secretary entertained and denied appellants' petition for the exercise of supervisory authority; and the present action was filed within ninety days thereafter. The Secretary argued before the District Court, and again argues before us, that the ninety-day statute of limitations bars this action.

We think the Secretary's reliance on the statute of limitations is without merit. The principle which governs this question is set down in *Outland v. Civil Aeronautics Bd.*, 109 U.S.App.D.C. 90, 284 F.2d 224 (1960).¹¹

¹¹ See also *Montship Lines v. Federal Maritime Board*, 111 U.S. App.D.C. 160, 295 F.2d 147 (1961). *Safeway Stores v. Coe*, 78 U.S.App.D.C. 19, 136 F.2d 771 (1943) is not in point, for in that case the Secretary did not lose his jurisdiction to decide on the merits the question presented in the petition.

When a party elects to seek a rehearing there is always the possibility that the order complained of will be modified in a way which would render judicial review unnecessary. Practical considerations, therefore, dictate that, when a petition for rehearing is filed, judicial review may be properly deferred until the petition has been acted upon. We hold, in the circumstances presented here, that the time for filing a petition for judicial review did not begin to run until the petition for rehearing had been acted upon.

The Secretary argues that this rule applies "only where the rules of practice of an administrative agency provide for a petition for rehearing or reconsideration and when one is timely filed." He argues that "there is no provision by statute or regulation permitting, much less giving, the right to file a petition for reconsideration [of a decision by the deputy solicitor]." A petition to the Secretary for the exercise of supervisory authority is a long standing procedure within the Department of the Interior, which, although not spelled out by statute or regulation, serves many of the same purposes of a petition for rehearing.

The Secretary correctly points out that he has the right to exercise his supervisory power so long as the property in question remains within his jurisdiction. Thus he argues that the time for petitioning for the exercise of his supervisory power might be limitless and the provisions of 30 U.S.C. 226-2 rendered nugatory, for a party losing a decision in the Department could delay his entry into court indefinitely by delaying his petition for the exercise of supervisory power. This argument fails to consider the power of the Secretary to formulate his own rules concerning the submission of the petition. The Secretary can prevent undue delay by setting time limits on these petitions. He is not at the mercy of the losing party, but he can force that party, by appropriate rules or adjudication, to bring petitions for the exercise of supervisory power within a certain time.

In the present case, the Secretary did not reject appellant's petition because it was filed too late, but, rather, he rejected it on the merits. The letter rejecting

appellants' petition cannot be read as "an orderly manner of indicating that the [original] communication had been received," but must be read as a rejection of the petition on the merits. Under the circumstances, we believe that appellants may seek review of the order of the Secretary within ninety days after the final rejection of their application on the merits. This they have done.

A different result might well be reached had the Secretary rejected appellants' petition for the exercise of supervisory authority on the ground that it was filed too late; but, as stated, he did consider it and denied it on the merits.

It follows that the action of the District Court should be reversed, and judgment entered for appellants.

Reversed

MCGOWAN, *Circuit Judge*, with whom *Circuit Judge* WILBUR K. MILLER joins, *concurring*: We concur fully in the reasons set forth by Judge Bastian for the reversal of the judgment of the District Court. We believe, however, that there is an additional ground why the appellee may not, in this court, press the claim that the statute of limitations bars the relief sought by appellants.

It is clear, in our view, that the District Court passed upon the statute of limitations point adversely to the appellee. The record shows that two separate motions were filed in the District Court by the appellee: one, a motion for summary judgment on the merits, in which was included a statute of limitations ground, and, two, a motion to dismiss the complaint based solely upon the statute of [fol. 88] limitations. In its memorandum opinion granting the first such motion, the District Court expressly excepted "that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations . . .," and stated that that part "should not form part of the basis for the granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied." In the judgment subsequently entered pursuant

to this memorandum, the ordering portions recited explicitly that "Defendant's motion to dismiss is denied." The appellee has taken no appeal from this part of the judgment adverse to him.

In the absence of such an appeal, we do not believe that appellee is free to raise the statute of limitations here as a basis of affirmance. Our conclusion in this regard rests on authority of long standing. In *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), Justice Cardozo, speaking for a unanimous court, said that "[T]he rule is inveterate and certain." There, the plaintiff surety had sought specific performance of a contract supplemented to an agreement of suretyship, or, alternatively, exoneration by the contractor of the surety from loss on unpaid bills. The District Court held the surety not entitled to the specific performance requested, but did grant the relief of exoneration. It entered a decree reflecting these dispositions. The contractor appealed from the grant the exoneration, but no cross-appeal was taken by the surety from the denial of specific performance. The Court of Appeals concluded that specific performance, rather than exoneration, was the proper relief and sent the case back with directions to the District Court to revise its judgment to this end.

The Supreme Court held that it was error for the Court of Appeals to take this action at the instance of a non-appealing, albeit successful, litigant. It cited a number [fol. 89] of cases, including an early decision of the Supreme Court, wherein it was said:

"Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken." *The Maria Martin*; 12 Wall. 31, 40-41.

One of the cases relied upon by Justice Cardozo was *Peoria & Pekin Union Ry. Co. v. United States*, 263 U.S. 528 (1924). There, the United States had prevailed below

on the merits, but it had also contended in the lower court that the venue was improperly laid. This latter point was resolved against it, but on appeal it was renewed. Justice Brandeis, speaking for the entire court, said (at p. 536) that "... by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered."

This court has recognized this principle. In *Wisconsin Bankers Association v. Robertson*, 111 U.S.App.D.C. 85, 294 F.2d 714, *cert. denied*, 368 U.S. 938 (1961), the case was litigated below both on the merits and on a challenge to plaintiff's standing to sue. The defendants prevailed on the former, but suffered an adverse ruling on the latter. The standing point was renewed on appeal, but this court said: "As a cross appeal was not filed by the appellees, we cannot consider, and therefore express no opinion concerning, their argument that the District Court erred in holding that appellants had standing to sue. In the absence of a cross appeal, an 'appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . .'" *United States v. American Ry. Exp. Co.*, [fol. 90] 1924, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087 . . .".¹ See also, *Whitehead v. American Security & Trust Co.*, 109 U.S.App.D.C. 202, 285 F.2d 282 (1960).

It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity

¹ 111 U.S.App.D.C. at 86, 294 F.2d at 715. The *Railway Express* case appears to have involved a situation where the lower court did not in fact decide or pass upon the ground sought to be raised on appeal. In this situation the successful litigant may well be able to renew the point on appeal as a basis of affirmance. Justice Brandeis reaffirmed the force of the *Peoria & Pekin Union Ry.* holding by this reference (n.11 on p. 436 of 265 U.S.): "... There the objection upon which the appellee relied was one of venue. The District Court overruled it; and then dismissed the bill on the merits. An objection to venue can be waived at any stage of the proceedings. This Court held that it was waived by failure to take a cross-appeal."

whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings.

The defense of the statute of limitations is not jurisdictional and it may be waived at any time. By failing to appeal from the denial of his motion to dismiss founded upon the statute, the appellee here made such a waiver and cannot now attack that part of the judgment with which he disagrees.

[fol. 91]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,598

Civil 1852-62

[File Endorsement Omitted]

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

Appeal from the United States District Court
for the District of Columbia.

Before: Wilbur K. Miller, Bastian and McGowan,
Circuit Judges.

JUDGMENT—Dated: September 19, 1963

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment—of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to enter judgment for appellants.

Per Circuit Judge Bastian.

Separate concurring opinion by Circuit Judge McGowan in which Circuit Judge Wilbur K. Miller joins.

[fol. 92] [File Endorsement Omitted]

* * *

[fol. 93]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

[Title Omitted]

PETITION FOR REHEARING—filed September 30, 1963

On September 19, 1963, this Court handed down a decision in the above-entitled appeal adverse to the Secretary of the Interior. The Secretary respectfully requests a rehearing by the Court and submits the following in support thereof:

1. This Court held, contrary to the Secretary's decision, that Executive Order No. 8979 of December 16, 1941, 6 Fed. Reg. 6471, providing that none of certain lands in the Kenai Peninsula, Alaska, "shall be subject to settlement, location, sale, or entry, or other disposition * * * under any of the public-land laws applicable to Alaska * * *," closed said lands to the filing for and issuance of oil and gas leases under the Mineral Leasing Act.

2. Pending before this Court are consolidated cases Nos. 17,358, 17,397, and 17,403-17,409, *Bert F. Duesing, et al. v. Stewart L. Udall*. These cases have been set for argument October 1, 1963. The oil and gas lease applications involved therein cover land included within the above-mentioned Executive Order and were filed during the period this Court has held the land was not open for [fol. 94] filing. Accordingly, those cases are subject to summary affirmance under this Court's decision in this case.

3. We have consented to a postponement of the argument in the *Duesing* cases and file this motion for re-

hearing in order that appellants in those cases, as well as the Government, may have the opportunity to present their views with respect to the decision in this case before it becomes final, so as to eliminate any possibility of conflicting decisions by this Court on the same subject. Copies of this petition are being served on counsel for appellants in the *Duesing* cases.

4. Moreover, there is a question as to the extent to which the opinion might jeopardize investments in producing oil wells made under leases applied for during the period in question which requires both careful analysis of the opinion and investigation as to facts of such production. This matter is now under investigation by the Department of the Interior but since it involves, *inter alia*, ascertainment of the amount of revenue that has been paid to the States of Alaska, it is not yet completed. This petition will be supplemented when the investigations are complete.

Respectfully submitted.

RAMSEY CLARK,
Assistant Attorney General.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D.C. 20530.

SEPTEMBER 1963.

[fol. 95]

CERTIFICATE OF COUNSEL

I, Edmund B. Clark, counsel for appellee in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

EDMUND B. CLARK
Attorney, Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE [Omitted in printing]

[fol. 96]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,598

[File Endorsement Omitted]

[Title Omitted]

Before: Wilbur K. Miller, Bastian and McGowan, Cir-
cuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—
October 16, 1963

On consideration of appellee's petition for rehearing,
and of appellants' answer thereto, it is

ORDERED by the court that the petition is hereby de-
nied.

Per Curiam.

[fol. 97]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,598

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR LEAVE TO FILE—filed November 2, 1963

The Secretary of the Interior, appellee in the above-entitled case, respectfully requests leave to file the attached Motion for Reconsideration and sets forth the following reasons therefor:

1. At the time the Secretary filed his petition for rehearing, he advised that certain supplemental information would be filed as soon as available. However, the petition for rehearing was denied before the information could be assembled and put in the form of a supplemental memorandum. We believe it highly desirable that all the information, and the arguments based thereon, be placed before this Court for its consideration.

[fol. 98] 2. The Secretary lodged the motion for consideration with the Clerk for filing on October 24, 1963. On October 28, the Deputy Clerk returned the motion with the attached letter, advising that there was no provision for filing a second motion for reconsideration. This was the first such motion.

For the foregoing reasons, we respectfully request leave to file the attached motion for reconsideration.

/s/ Ramsey Clark
Assistant Attorney General

/s/ Roger P. Marquis

/s/ Edmund B. Clark

Attorneys, Department of Justice
Washington, D.C., 20530

OCTOBER 31, 1963.

CERTIFICATE OF SERVICE [Omitted in printing]

[fol. 99]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,598

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR RECONSIDERATION OF DENIAL OF PETITION
FOR REHEARING—filed November 8, 1963

The Secretary of the Interior respectfully moves this Court to reconsider its denial, dated October 16, 1963, of the Secretary's Petition for Rehearing in the above-entitled appeal. In his Petition for Rehearing, the Secretary advised that a supplemental memorandum would be submitted in support of the Petition for Rehearing as soon as certain supplemental information was available. The supplemental information has been obtained and the memorandum prepared for filing. However, before the memorandum could be filed, the Petition for Rehearing was denied. Our analysis of the decision, particularly in view of facts which now appear, makes it clear, we believe, that the judgment is erroneous and should not stand [fol. 100] for reasons to be developed herein. Moreover, it is desirable that all of the information shall have been placed before this Court for its consideration.

1. The opinion of this Court discloses an inconsistency of substantial importance which warrants a reconsideration of the decision. Thus, the Court held "that the lands in the Kenai National Moose Range were closed to oil and gas leases by the terms of the order creating the Range in 1941 until it was opened on August 2, 1958" (Slip Opinion, p. 9). The 1941 order was a withdrawal by the President of the United States. The Secretary of the Interior has no authority, in his own right, to withdraw public lands or to modify or revoke withdrawals, except in those few instances (not here involved) where Congress has authorized him to do so. The President has

delegated to the Secretary his authority to withdraw and to modify or revoke withdrawals. However, that delegation was subject to certain limitations, the most important limitation, for purposes of this case, being (Executive Order 10355 of May 28, 1952, 17 Fed. Reg. 4831):

All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders * * *.

[fol. 101] The notice published August 2, 1958, does not relate to the 1941 Executive Order, does not purport to be a modification of it, and is not designated as a Public Land Order. On the contrary, the 1958 notice was merely notice that the 1953 suspension order directed by the Secretary had been lifted. And it must be recalled that the 1953 suspension order was based on the supposition that the Range was not closed to oil and gas leases by the 1941 order. This Court's decision is, of course, that the 1953 order and all supplemental regulations pursuant thereto were void for lack of authority. It should likewise follow that the 1953 order was null and void. Yet for some unstated reason, this Court says the 1958 notice is valid.

Moreover, as construed by this Court, the 1958 notice is void because it was not designated a Public Land Order. The distinction between a Public Land Order and the 1958 notice that the 1953 suspension had been lifted is not a mere technical one. The Public Land Order was required when the Secretary was exercising a power specifically delegated by the President, as distinguished from the exercise of a power generally his because of his authority as custodian of the public lands. The Secretary was well aware of this distinction in this instance. This is shown by his designation as Public Land Orders the [fol. 102] two orders, 487 and 1212, which were clearly modification and revocation of withdrawals. By their very terms, Public Land Orders under the delegated power from the President have a dignity and importance beyond that of the ordinary Secretarial regulations.

It is thus clear that, if the Range was closed to oil and gas leases by the 1941 order, it is still closed and appellants' action should be dismissed.

2. The fact that the lessees whose leases this Court has declared nullities were not parties to the litigation was before the district court and this Court. We have many times urged upon this Court the argument that this type of action against the Secretary cannot be decided in the absence of the lessee who is an "indispensable party." See *Southwestern Petroleum Corporation v. Udall*, No. 17,545, argued October 8, 1963, for the most recent occasion. One of the difficulties always presented is that we consider it inappropriate for us, on behalf of the Secretary, to urge facts or equities which may favor such a lessee. In this instance, one of the lessees filed with this Court a brief *amicus curiae* setting forth his interests in detail. Undoubtedly he and other lessees are not bound by [fol. 103] the decision and there is every reason to suppose that they would object and file an action to prevent the Secretary from cancelling their leases.¹

The decision in this case does not, in terms, direct cancellation of the leases which this Court has declared to be nullities. Perhaps this is *sub silentio* recognition by this Court of the problem of the indispensable party doctrine. Cf. *Barash v. Seaton*, 103 U.S.App.D.C. 159, 256 F.2d 714 (1958), where this Court took jurisdiction, yet specifically refused to order cancellation, leaving the case in limbo. But what is the district court to do? Entry of a judgment declaring the leases a nullity will accomplish nothing because the lessee is not bound. Directing reinstatement of the appellants' offers, which is what appellants sought in their complaint, also creates problems because the Secretary cannot grant the applications without cancelling the existing leases. Mere reinstatement of the applications gives appellants nothing. The only other alternative would be the issuance of conflicting

¹ Since all the lessees are in fact assignees of the original lessee and presumably bona fide purchasers, there is at least a question whether the Secretary can or should act to adversely affect their interest. See 30 U.S.C. sec. 184.

leases. Thus, it appears that the decision, unless clarified, does no more than create further litigation.

[fol. 104] We submit that, because of the incongruous situation created by the absence of the lessees, a reconsideration of the entire matter is justified, and we now present further information and argument based thereon which, we believe, require reversal of the decision. In any event, we submit that the judgment of this Court should be clarified specifically to state what relief is contemplated.²

3. This Court was aware at the time of its decision in the above-entitled appeal that the Secretary of the Interior had interpreted Executive Order No. 8979 of December 16, 1941, as not withdrawing the Kenai National Moose Range from the operation of the Mineral Leasing Act in the only two cases where opinions were published on the issue. The Court was also aware that the entire series of regulations and orders from 1948 to date (Slip Opinion, pp. 2-6) was based upon that interpretation.

In answer to this line of administrative construction, the Court stated only that (Slip Opinion, pp. 9-10):

[fol. 105] Deference to agencies does not reach the extent of sanctioning irrational agency action, however; nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the agency's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable.

The Court did not point out what it felt was confusing or conflicting about the series of orders. One thing is perfectly clear and the Court does not deny it. All of the orders and regulations were consistent with the Secretary's interpretation of the 1941 Executive Order, i.e., that the Range was at all times open for leasing under

² Only upon such clarification will it become plain whether there has been a final adjudication so that the case would be ripe for Supreme Court review.

the Mineral Leasing Act. Moreover, the action taken by the Secretary in actually issuing leases is further demonstration of the consistency of his interpretation and the rights and interests of many parties not party to this litigation have been affected by those actions.³

[fol. 106] Actual practice has revealed that at least 21 leases were issued prior to August 2, 1958. As of the present time, there are 127 producing leases and leases committed to production, all of which were issued pursuant to offers filed prior to August 2, 1958. Some 21 of these leases had, by July 31, 1963, produced 23,506,519 barrels of oil and 482,248,000 cubic feet of gas, upon which \$7,296,922.72 has been paid to the United States in royalties. This figure does not include rentals. In addition, 351 leases upon which production has not yet started have been issued pursuant to applications filed prior to August 2, 1958. Production on the Moose Range is the only production in Alaska on leases issued under the Mineral Leasing Act. "

Furthermore, 90% of all revenues from oil and gas on public land, including rentals as well as royalties, have been and are being paid to the State of Alaska. Several hundred thousand dollars have been paid annually to the State in rentals alone. These revenues constitute a substantial portion of the State's income and cessation of the payments even for a temporary period would be a crippling blow to this new State's economy.

Apart from the general confusion caused by the decision declaring the leases nullities, the Department of the Interior will be faced with serious problems concerning the value of this past production from such leases and additional problems as to the rights of lessees to secure refunds of royalties and rentals. Regardless of what solutions may be found for these problems, it is not an exaggeration to say that further litigation is clearly predictable.

³ So far as we can see, the only confusion that exists arises from failure to understand the reasons for specific and somewhat unusual details due to the fact that a wildlife refuge is involved. Thus, the 1953 suspension order was supplemented by regulations allowing the issuance of leases under certain circumstances and carefully prescribed conditions for operation.

Clearly, the interests of many parties, including the States of Alaska, none of whom were parties to this litigation, have been based upon reliance on the Secretary's consistent interpretation of the 1941 Executive Order. Indeed, it is well to bear in mind that there was no way for anyone desirous of developing the resources of the public land in Alaska to do so save by relying on the Secretary's actions because he is entrusted with the care and management of these lands.

[fol. 108] It is for this reason that the Secretary's interpretations made within the scope of his duties must be given such great weight. As this Court reiterated in its decision in another case handed down two weeks after the instant decision, *LaRue v. Udall*, No. 17,711, decided October 3, 1963 (Slip Opinion, p. 8):

We have carefully considered all the other contentions made by appellants, but do not find in them any reason for disturbing the Secretary's decision. As we said in *Safarik v. Udall*:

"It is obvious that the Secretary of the Interior in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong."

We do not now reargue the correctness of the Secretary's decision as an initial matter. We have done that in our original brief. We now request the Court to reconsider its holding that "the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand" (Slip Opinion, p. 10). This Court's discussion of the Secretary's reasons for his interpretation demonstrates that there was a not unreasonable basis for it. In fact, this Court's introduction of its reasons for disagreeing with the Secretary—"There are persuasive counter-arguments to the Secretary's contentions" (Slip Opinion, [fol. 109] ion, p. 8)—indicates that there were arguments to be advanced in favor of the Secretary's decision. It follows that his decision was not arbitrary. Particularly

because of the many intervening rights based upon actions of the Secretary and the expenditures made in reliance upon his actions, we submit that his interpretation should not have been overturned. As was stated by the Supreme Court in *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915):

2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

We submit that the usage and practice of the Secretary of the Interior with respect to issuance of oil and gas [fol. 110] leases on the Kenai National Moose Range prior to August 2, 1958 (at least 21 leases in 1954 and 1955), and issuance subsequent to that date based on applications filed prior thereto (more than 350 leases), are precisely the type of usage and practice referred to in the above-quoted statement of the Supreme Court. An analogous principal of the law as applied to a court decision is that it becomes a rule of property which will not be retroactively disturbed when there has been reliance thereon. *United States v. Title Ins. Co.*, 265 U.S. 472, 484 (1924). Nowhere did this Court indicate that it had really considered or given weight to the consistent administrative construction by the Secretary of the 1941 Executive Order.

[fol. 111] 4. As further demonstration of the validity of the Secretary's interpretation and his consistent practice under it, there is more than the presumption referred to in *Midwest Oil*, *supra*,

"that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." Here the specific actions were called to the attention of Congress and ratified some five years prior to the Secretary's decision in this case. In connection with proposed legislation during the 84th Congress concerning wildlife refuges, the Subcommittee of the Senate Committee on Interstate and Foreign Commerce and the House Committee on Merchant Marine and Fisheries were informed that 21 oil and gas leases had been issued on the Kenai National Moose Range in 1954 and 1955. The House Committee was advised of the 1947 regulation governing the issuance of oil and gas leases on refuge lands (12 Fed. Reg. 7324, 43 C.F.R., 1949 ed., 192.9) and the order of August 31, 1953, suspending action on all pending offers.*

[fol. 112] The House Committee submitted a report concluding that the suggested procedures for protecting wildlife refuges would be impractical but continued (H. Rept. No. 1941, 84th Cong., 2d. sess.):

Hence it was decided to try, for an experimental period of time, an arrangement between the Secretary of the Interior and the committee under which each proposed alienation or relinquishment of any interest the Fish and Wildlife Service has in lands under its jurisdiction would be submitted to the committee, and the committee would have 60 days to indicate its approval or disapproval of the action contemplated.

Thereafter, on June 29, 1956, the Director of the Fish and Wildlife Service informed the Chairman of the Committee of proposals for the development of the oil and gas resources in the Kenai National Moose Range, noting that Delegate Bartlett of Alaska concurred in the proposal to issue oil and gas leases on 71,680 acres of land in the Range. Under date of July 27, 1956, the Chairman of the

* Hearings before the Senate Subcommittee of the Committee on Interest and Foreign Commerce, 84th Cong., 2d sess., on S. 2101 and Hearings before the House Committee on Merchant Marine and Fisheries, 84th Cong., 2d sess., on H.R. 5306, H.R. 6723, and H.R. 8839.

Committee informed the Director that, after considering the matter, the members of the Committee were unanimous in the view that the proposal would not prove detrimental. The Chairman stated "Accordingly, I and the Committee, concur in the judgment of the Fish and Wildlife Service with reference to the issuance of the leases."

[fol. 113] "Surely such a record constitutes ratification of administrative construction, and confirmation and approval" of the Secretary's interpretation of the 1941 Executive Order. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 293 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963); *Fleming v. Mohawk Co.*, 331 U.S. 111, 119 (1947); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *State of Wyoming v. United States*, 310 F.2d 566, 580 (C.A. 10, 1962). The theory of these cases, all of which relate to administrative construction of acts of Congress, would seem to apply with much greater force here where the basic instrument to be construed is an Executive Order. It seems hard to believe that the Secretary of the Interior could consistently, over a period of years, misconstrue the intention of the President.

CONCLUSION

We respectfully request this motion for reconsideration be granted.

/s/ Ramsey Clark
Assistant Attorney General
/s/ Roger P. Marquis
/s/ Edmund B. Clark

Attorney, Department of Justice
Washington, D.C., 20530

OCTOBER 24, 1963

[fol. 114] CERTIFICATE OF SERVICE
[Omitted in printing]

[fol. 115]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 17,598

Filed November 8, 1963 Nathan J. Paulson, Clerk

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, Secretary of the Interior, APPELLEE

Before: Wilbur K. Miller, Bastian and McGowan, Circuit Judges, in Chambers.

ORDER GRANTING LEAVE TO FILE MOTION FOR RECONSIDERATION AND DENYING MOTION FOR RECONSIDERATION—November 8, 1963

On consideration of appellee's motion for leave to file motion for reconsideration, and it appearing that appellee's motion for reconsideration of denial of petition for rehearing has been lodged with the Clerk, it is

ORDERED by the court that the aforesaid motion for leave to file be granted, and the Clerk is hereby directed to file appellee's motion for reconsideration of denial of petition for rehearing in this case, and on consideration whereof, it is

FURTHER ORDERED by the court that appellee's motion for reconsideration of denial of petition for rehearing is denied.

Per Curiam

[fols. 116-117]

[fol. 118]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 119]

SUPREME COURT OF THE UNITED STATES

[Title Omitted]

**ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—January 11, 1964**

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 6, 1964.

/s/ Earl Warren.
Chief Justice of the United States

Dated this 11th day of January, 1964.

[fol. 120]

SUPREME COURT OF THE UNITED STATES

No. 813, October Term, 1963

STEWART L. UDALL, Secretary of the Interior, PETITIONER

v.

JAMES K. TALLMAN, ET AL.

ORDER ALLOWING CERTIORARI—March 30, 1964.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented	2
Statutes, regulations, and orders involved.....	2
Statement.....	3
Reasons for granting the writ:	
I. The question is important.....	4
II. The decision is wrong.....	7
III. The latent jurisdictional question is also im- portant.....	17
Conclusion.....	21
Appendices:	
A. The development and purpose of the regulations.....	1a
B. Statutes, orders, and regulations involved.....	8a
C. Opinion and orders of the court of appeals.....	19a

CITATIONS

Cases:

<i>Barash v. Seaton</i> , 256 F. 2d 714.....	17
<i>Boesche v. Udall</i> , 373 U.S. 472.....	9
<i>Bourdieu v. Pacific Oil Co.</i> , 299 U.S. 65.....	18
<i>Brady v. Work</i> , 263 U.S. 435.....	19
<i>Brooks v. Dewar</i> , 313 U.S. 354.....	18
<i>Brown v. Christman</i> , 126 F. 2d 625.....	18
<i>City of Fresno v. California</i> , 372 U.S. 627.....	14
<i>Earl J. Boehme</i> , 62 I.D. 9.....	8
<i>Fleming v. Mohawk Co.</i> , 331 U.S. 111.....	14
<i>Flynn v. Brooks</i> , 105 F. 2d 766.....	18
<i>Haley v. Seaton</i> , 281 F. 2d 620.....	8, 1a
<i>Hoey v. Wilson</i> , 9 Wall. 501.....	18
<i>Inland Empire Council v. Millis</i> , 325 U.S. 697.....	18
<i>Ivanhoe Irrigation District v. McCracken</i> , 357 U.S. 275.....	14
<i>McLaren v. Fleischer</i> , 256 U.S. 477.....	12
<i>New Mexico v. Lane</i> , 243 U.S. 52.....	19

II

Cases—Continued

	Page)
<i>Noel Teuscher</i> , 62 I.D. 210.....	8
<i>Ohio v. Helvering</i> , 292 U.S. 360.....	18
<i>Opinion of the Solicitor</i> , 48 I.D. 459.....	8
<i>Opinion of the Solicitor</i> , 55 I.D. 205.....	8
<i>Shields v. Barrow</i> , 17 How. 129.....	19
<i>Texas v. Interstate Commerce Commission</i> , 258 U.S. 158.....	19
<i>Unemployment Comm'n v. Aragon</i> , 329 U.S. 143.....	15
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459.....	7, 15

Statutes and regulations:

<i>Alaska Submerged Lands Act of July 3, 1958</i> , 72 Stat. 322: § 6.....	13-14
<i>Mineral Leasing Act of 1920</i> , 41 Stat. 437, as amended, 30 U.S.C. 181 <i>et seq.</i> :	
§ 1.....	2, 9, 8a
§ 17.....	2, 3, 8a
<i>Pickett Act of June 25, 1910</i> , 36 Stat. 847, 43 U.S.C. 141-142.....	7, 1a, 4a
<i>Regulations of the Department of Interior</i> , § 192.9 (43 C.F.R. 192.9).....	3, 10a
<i>Revisions to 43 C.F.R. 192.9:</i>	
12 F.R. 7334.....	3, 10a
20 F.R. 9009.....	3, 11a
23 F.R. 227.....	3, 13a
43 C.F.R. 295.8.....	6a

Miscellaneous:

<i>Annual Report of the Secretary of the Interior</i> , 1957, 1958.....	13
<i>BLM Memorandum to Area Administrator</i> , Area 4, August 12, 1955.....	11, 2a
<i>Department of Interior Press Release</i> , July 25, 1958.....	5a
102 Cong. Rec. A6581-A6583.....	1a
104 Cong. Rec. 11836-11838.....	14
<i>Executive Order No. 8979</i> , 6 F.R. 6471....	2, 7, 8, 12, 7a, 9a
<i>Executive Order No. 9337</i> , 8 F.R. 5516.....	16
<i>Executive Order No. 10355</i> , 17 F.R. 4831.....	15
<i>Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc.</i> , 84th Cong., 2d Sess.....	13, 2a

III

Miscellaneous—Continued

Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess.....	Page 13, 2a
Hearings before the Senate Committee on Interior and Insular Affairs on H.R. 8054, 85th Cong., 2d Sess....	14
H. Rep. No. 1941, 84th Cong., 2d Sess.....	4a
Hoffman, <i>Oil and Gas Leasing on the Public Domain</i> (1951).....	9
Letter dated July 25, 1956, from Chairman Bonner, to Director, Fish and Wildlife Service, attached to Department of Interior Press Release, January 8, 1958.....	13
Order of the Secretary of Interior issued on August 2, 1958 (23 F.R. 5883).....	3, 17a
Public Land Order No. 487, 13 F.R. 3462.....	2-3, 4, 8, 10a
S. Rep. No. 1720, 85th Cong., 2d Sess.....	14

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
PETITIONER

v.

JAMES K. TALLMAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 19, 1963.

OPINION BELOW

The opinion of the court of appeals (App. 19a)¹ is reported at 324 F. 2d 411.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1963 (App. 35a). A timely petition

¹ "App." refers to the appendix to this petition. "J.A." refers to the Joint Appendix filed in the court of appeals.

for rehearing was denied on October 16, 1963 (App. 35a). An application for leave to file a motion for reconsideration of the petition for rehearing was granted on November 8, 1963, and, on the same date, the motion for reconsideration was denied (App. 35a-36a). On January 11, 1964, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the orders withdrawing the public-domain lands within the Kenai National Moose Range in Alaska from various forms of private appropriation (Executive Order No. 8979; 6 F.R. 6471; Public Land Order No. 487, 13 F.R. 3462) also closed the lands to oil and gas leasing under the Mineral Leasing Act of 1920 (41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*), with the consequence that the leases thereafter issued by the Secretary of the Interior on 900,000 acres of Range land were invalidly issued and are subject to cancellation.²

STATUTES, REGULATIONS, AND ORDERS INVOLVED

Sections 1 and 17 of the Mineral Leasing Act of 1920 (41 Stat. 437, 443, as amended, 30 U.S.C. 181, 226); Executive Order No. 8979, 6 F.R. 6471; Public

² There is also latent in the case the following jurisdictional question (see pp. 17-20, *infra*):

Whether the holder of an oil and gas lease issued by the Secretary is an indispensable party to an action by a subsequent applicant to compel the Secretary to issue a lease to him on the ground that the lease first issued was invalid.

Land Order No. 487, 13 F.R. 3462; § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9), as in force from time to time (12 F.R. 7334; 20 F.R. 9009; and 23 F.R. 227); and an order of the Secretary of Interior issued on August 2, 1958 (23 F.R. 5883) are set forth in pertinent part in Appendix B, pp. 8a-18a, *infra*.

STATEMENT

Between October 15, 1954, and January 28, 1955, D. J. Griffin and other persons filed applications for oil and gas leases on some 25,000 acres of the public domain located within the Kenai National Moose Range in Alaska. On August 14, 1958, the respondents filed offers to lease the same lands. Acting pursuant to § 17 of the Mineral Leasing Act of 1920 (App. 8a), which requires leases on unproven lands to be given to the qualified persons "first making application," the Bureau of Land Management of the Department of Interior issued leases on the tracts, effective September 1, 1958, to the Griffin group of applicants. In October 1959 the respondents' applications were rejected on the ground that the lands had been leased to prior applicants (App. 24a).

From the rejection of their applications, the respondents appealed to the Director of the Bureau of Land Management (J.A. 25-31) and then to the Secretary of the Interior (J.A. 32-39, 63), both of whom affirmed the decision. Respondents thereafter brought this action to compel the Secretary to issue oil and gas leases to them (J.A. 1-11). The Griffin group, to whom leases on the same lands had previ-

ously been issued, were not made parties to the action.

The district court granted summary judgment in favor of the Secretary dismissing the complaint (J.A. 73-75). The court of appeals reversed (App. 35a). It held that the Executive Order by which the Moose Range had been created in 1941 (Exec. Order No. 8979, App. 9a) had withdrawn the lands from availability for leasing under the Mineral Leasing Act; that they were not reopened for leasing until August 14, 1958 (as a consequence of a revised departmental regulation); that the applications of the Griffin group, filed while the lands were "closed" to leasing, were ineffective; that the leases granted to them were nullities; and that the respondents, as the persons "first" making application for leases after the lands became available for leasing in 1958, were accordingly entitled to be issued leases on their applications.³

REASONS FOR GRANTING THE WRIT

I

THE QUESTION IS IMPORTANT

1. Some 433 oil and gas leases covering over 900,000 acres of the Kenai Moose Range have been issued by the Secretary on applications filed prior to 1958—i.e., during the period that the court of appeals has held the Range was "closed" to leasing. The area so leased constitutes substantially the entirety of the portion of the Range on which the Secretary's regulations permit leasing (essentially, the northern half).

³ As to the application by respondent Coyle, the decision was based on Public Land Order No. 487 rather than the 1941 Executive Order. See note 8, *infra*.

We are advised by four oil companies* that they have invested over \$90 million in developing the leases in which they have interests. A major oil strike was made in the Range in 1957, and other discoveries have since been made. There are now 22 leases in production or participating in production. Production to date under the leases has exceeded 26 million barrels of oil[†] and 5 billion cubic feet of gas.[‡] From its retained royalties (5% initially on some earlier leases; 12.5% generally), the United States has received over \$8 million, reflecting production worth more than \$77 million. The Geological Survey of the Department of Interior estimates that the proven reserves of oil and gas subject to the leases have a value ranging from \$750 million to over \$1 billion. The production in the Kenai Range is the only commercial oil and gas production in the State of Alaska.

The decision below, if correct, means that all the leases on the Kenai Range were improperly issued and are now subject to cancellation by the Secretary. The decision thus jeopardizes investments of millions of dollars made by private persons in reliance upon the Secretary's action and casts in doubt the ownership of hundreds of oil and gas leases of great value. The drastic implications of the decision, the number of people affected by it, the enormous value of the interests at stake, and the confusion created by the

* Richfield Oil Corporation, Standard Oil Company of California, Marathon Oil Company, and Union Oil Company of California.

† 26,248,000 barrels to October 31, 1963.

‡ 4,896,000,000 cubic feet to July 31, 1963, and, of course, substantial quantities since then.

decision give more than ample reason for review of the decision by this Court.

2. It is important also that the question be promptly resolved in order to forestall a multiplicity of litigation and to remove the disruptive effects of the controversy upon the orderly development of the petroleum resources in the Kenai basin.

As the predicate for directing the Secretary to issue leases to the respondents, the opinion of the court of appeals declares that the leases previously issued to the Griffin group of applicants are "nullities." The Griffin lessees, however, were not parties to this proceeding and are in no way bound by the decision. How the decision is to be given effect in those circumstances the court does not say, but should any attempt be made either by the Secretary or the respondents to interfere with the rights of the Griffin lessees, new court actions must inevitably result. Since the present proceedings could not be invoked as *res judicata*, the potentiality for inconsistent judgments is great. This case, moreover, involves only 20 of the 433 leases issued in like circumstances, and attempts by other lessees to quiet their titles may be anticipated.

Pending the final resolution of the question, the further development of the Kenai basin will be seriously disrupted, for the lessees now in possession are unlikely to continue to expend millions of dollars for development of leases and construction of transmission facilities—expenditures providing employment and income vital to the Alaskan economy—while the ownership of the leases remains in doubt. In some cases, failure promptly to make additional investments of a conservation nature could cause a permanent loss in

the long-run productivity of the field. The doubts created by the decision may also affect the willingness of purchasers of the oil and gas production to continue to pay the existing lessees and royalty-owners, at least without complicated arrangements protecting them from further liability. Among those peculiarly affected by any resulting disruption in the current payment of royalties would be the State of Alaska, which now receives, as an important contribution to its revenues, 90% of the royalties and rentals reserved by the United States under the leases. While all the ramifications of the decision of course cannot be foreseen with certainty, prompt resolution of the question by this Court is in our judgment essential to avoid a major dislocation in the development of the petroleum resources of Alaska.

II

THE DECISION IS WRONG-

The Kenai National Moose Range was created in 1941 by Executive Order No. 8979 (App. 9a), by which some two million acres of the public domain were "withdrawn and reserved * * * as a refuge and breeding ground for moose." The order provided that—

None of the above-described lands * * * shall be subject to settlement, location, sale, or

⁷ The President has inherent power to effect such withdrawals. *United States v. Midwest Oil Co.*, 236 U.S. 459. The power was confirmed in part, though not limited, by the so-called Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141-142. The Kenai Range order did not expressly invoke the Pickett Act.

entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, * * *.

The question is whether that provision "closed" the Range to leasing under the Mineral Leasing Act of 1920 and made invalid any leases issued on applications filed while it was outstanding.*

1. Ever since the adoption of the Mineral Leasing Act in 1920, the Department has consistently, as it did in this case, characterized oil and gas leasing under that Act as not effecting a disposition or appropriation of land. It has accordingly held⁹ that, unless it specifically mentions mineral leasing, an order withdrawing lands from availability for private appropriation does not *per se*¹⁰ bar oil and gas leasing.

* An area along the shore of Cook Inlet was excepted from the Executive Order but was subsequently, by order of the Secretary of Interior, "temporarily withdrawn from settlement, location, sale or entry, for classification and examination and in aid of proposed legislation." (Public Land Order No. 487, 13 F.R. 3462 (1948).) The court of appeals also held invalid any leases issued in the Cook Inlet area on applications filed while that order was outstanding. One of the leases in this case (that conflicting with respondent Coyle's application) was in that category. As to it, therefore, the question turns upon the effect of the 1948 Public Land Order rather than of the 1941 Executive Order.

⁹ See, e.g., *Opinion of the Solicitor*, 48 I.D. 459 (1921) ("reserved from entry, location, or other disposal"); *Noel Teuscher*, 62 I.D. 210 (1955) ("withdrawn from settlement, location, sale or entry"); *Opinion of the Solicitor*, 55 I.D. 205, 211 (1935) ("temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification").

¹⁰ The Secretary may, of course, conclude that the purposes of a particular withdrawal would be impaired by leasing and for that reason decline to issue leases in the exercise of his discretion. See e.g., *Earl J. Boehme*, 62 I.D. 9 (1955); *Haley v. Seaton*, 281 F. 2d 620 (C.A.D.C.).

That widely-publicized ¹¹ view is supported by a variety of considerations. In the first place, the interests created by an oil and gas lease under the Act are very limited, consisting essentially of but a right to prospect for oil and gas and then to produce from wells located on the land whatever oil and gas is discovered.¹² In the second place—and with peculiar significance in the light of the function of a withdrawal order—oil and gas leasing, unlike outright dispositions of land, is not usually inconsistent with the reservation of lands primarily for other purposes.¹³ Finally, in contrast to private appropriation of the public domain by settlement, entry or location—in which rights are acquired by autonomous private action (*e.g.*, staking out a location)—the issuance of oil and gas leases always remains subject to the Secretary's discretion. While formal withdrawal of

¹¹ In 1951, well before the events involved in this case, the leading treatise on mineral leasing in the public domain described the Department's practice as follows:

* * * Ordinarily, a withdrawal from sale or other disposition of the public domain is no bar to the issuance of a lease, as leasing is not disposing of the land. It is merely granting the right to prospect and, upon discovery, to produce oil or gas from the land under prescribed conditions. Title to the land and the minerals therein remain in the United States. * * *

Hoffman, *Oil and Gas Leasing on the Public Domain* (1951), pp. 33-34. Mr. Hoffman was the Chief of the Branch of Minerals of the Bureau of Land Management.

¹² For the limited nature even of that right, see *Boesche v. Udall*, 373 U.S. 472, 477-478.

¹³ That view is reflected in the Mineral Leasing Act itself, which by its own terms was made fully applicable to lands previously withdrawn for wildlife conservation or other purposes. See § 1, App. 8a.

lands from settlement and the like is essential to prevent rights from being acquired by "adverse" private action, the regulation of oil and gas leasing—to whatever extent is necessary or desirable to prevent interference with the purposes of the withdrawal—can be left to the Secretary's discretion, exercised by regulation or individual determinations. Seen in the light of those considerations and with an appreciation of the basic function of withdrawal orders, the Secretary's interpretation of the 1941 Executive Order as not barring mineral leasing was, we submit, not only textually permissible but the only sound one.

2. But far more important than the degree to which the language of the order compels that reading is the fact that the agency primarily responsible for the administration of the public lands has given it that interpretation. That interpretation has, moreover, been given extensive practical application in the conduct of the Department's affairs over a long period of time; it has been relied upon by private persons in the making of investments of millions of dollars; and it has been fully reported to and acquiesced in by Congress.

a. The Department issued the first oil and gas lease on land within the Moose Range (albeit on only 15 acres) in 1953.¹⁴ In 1954, four leases were issued covering 2,201 acres; in 1955, 28 leases covering 55,192 acres; in 1956, 31 leases covering 67,631 acres; and in

¹⁴ The leasing data summarized here is based on a survey of the records of the Anchorage land office. The compilations thus made may be incomplete in some details but they are sufficiently accurate for present purposes.

1957, 3 leases covering 4,800 acres. All told, during the years 1953-1957, the Department issued 67 leases covering some 133,000 acres.

Offers covering almost the whole of the rest of the Range had also been accepted for filing, and initially processed, during that period,¹⁵ but final action on them had been suspended pending the issuance of regulations imposing new restrictions on oil and gas leasing in wildlife refuges. The regulations were issued on January 8, 1958 (App. 13a-16a), and an implementing order specifically applicable to the Kenai Range was issued on August 2, 1958 (App. 17a-18a). Their effect was to forbid mineral leasing altogether in the southern half of the Range and to require new restrictions to be included in leases issued in the northern half. Promptly after their issuance, the pending applications for lands in the northern half were acted upon and 366 leases (including the Griffin leases) were issued on them covering 784,000 acres—substantially the whole of the northern portion of the Range that had not already been leased.

The administrative construction of the 1941 Executive Order as leaving the Kenai Range available for leasing has thus been acted upon, not merely sporadically or inconsistently, but to the extent of leasing on that basis substantially the whole of the Range not closed to leasing by the regulations. It was executed, in short, to the point of exhaustion of the land avail-

¹⁵ Over 300 applications were pending on file as early as August 1955, almost two years before the first discovery of oil (in July 1957) and the resulting flood of applications. BLM Memorandum to Area Administrator, Area 4, August 12, 1955.

able for leasing. A more conclusive showing of the practical construction given to an order by those charged with its administration could not be made.¹⁴

b. In reliance upon the Secretary's interpretation of the Executive Order, extensive development has taken place on the Range, involving the expenditure of large sums of money. Long-continued reliance by private persons upon the action taken is surely one of the most compelling reasons for not disturbing an established administrative course of conduct. See, e.g., *McLaren v. Fleischer*, 256 U.S. 477, 481.

c. In early 1956, the appropriate committees of Congress had under consideration proposals to restrict mineral leasing in wildlife refuges. During the hearings, representatives of the Department advised the committees, *inter alia*, of the issuance during 1954

¹⁴ The court of appeals, having held that the Range was "closed" to leasing by the 1941 Executive Order (making the Griffin applications invalid), went on to hold that the northern portion was "opened" for leasing by the 1958 regulations and order mentioned above (making the respondents' applications, filed after their issuance, valid). Since the issue here is the initial question of the effect of the 1941 Executive Order, the regulations are not directly involved. However, because of the confusion about their purpose engendered by the court of appeals' opinion—and the arguments respondents make based upon them—we have added as an Appendix to this petition (App. 1a-7a) a full explanation of the evolution of the regulations. As is there shown, the regulations clearly presupposed the availability of the Kenai Range for leasing under the 1941 withdrawal order—which is, indeed, why they forbade leasing on the southern portion—and thus, far from supporting respondents, give formal confirmation of the consistent administrative practice.

and 1955 of 21 leases in the Kenai Moose Range." On June 29, 1956, pursuant to an interim procedure that had been agreed upon,¹⁷ the Department submitted to the House Committee on Merchant Marine and Fisheries for its advance approval a proposal to lease an additional 71,680 acres in the Moose Range. After a public hearing, the Chairman of the Committee, by letter dated July 25, 1956, advised the Department that the Committee was in agreement that the leases would not be detrimental to wildlife uses and should be issued.¹⁸ The leases were then issued and it was under them that the first discovery of oil (in July 1957) in the Kenai Range was made.¹⁹

Nor was Congressional approval of the leasing activities in the Kenai Range limited to informal committee advice and legislative inaction. The "Alaska Submerged Lands Act" of July 3, 1958 (72 Stat. 322), authorized for the first time the granting of oil and gas leases on inland navigable waters in Alaska. Sec-

¹⁷ Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., pp. 135, 141, 147; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92-93.

¹⁸ See H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12-13.

¹⁹ Letter dated July 25, 1956, Chairman Bonner, Committee on Merchant Marine and Fisheries to Director, Fish and Wildlife Service, attached to Department of Interior Press Release, January 8, 1958.

²⁰ The discovery and the leasing activities were, of course, also reported to the President. Annual Report of the Secretary of the Interior, 1957, pp. 279, 356; *id.*, 1958, pp. xxxv, 104, 199, 258, 321.

tion 6 gave existing lessees (and those with pending offers) a preference right to have their leases (or applications) expanded to include any navigable waters within their boundaries. The history of that provision shows that one of the specific purposes was to protect the holders of producing leases in the Kenai Range (i.e., the leases granted in 1956 on which oil had been discovered in 1957) against leases being given to other persons on navigable waters overlying the oil and gas deposits that had been discovered and developed by them. It was adopted with full knowledge of the leasing activities that had taken place in the Kenai Range and of the intention of the Department to continue issuing leases on the large number of pending applications," and the committee report expressly referred to the producing leases on the Kenai Range as among those meant to be augmented by the inclusion of navigable waters." Thus the Congress not only regarded the outstanding leases as validly issued but, acting on that belief, provided for their enlargement. That purposeful Congressional acceptance of the established administrative construction, if it does not amount to actual ratification, at the very least adds greatly to its weight."

3. The orderly administration of public affairs forbids the courts lightly to invalidate a long-continued

²¹ See Hearings before the Senate Committee on Interior and Insular Affairs on H.R. 8054, 85th Cong., 2d Sess., pp. 19-20, 24-25, 32, 76-77, 93-94; 104 Cong. Rec. 11836-11838.

²² S. Rep. No. 1720, 85th Cong., 2d Sess., pp. 3, 5-6.

²³ See, e.g., *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 293; *City of Fresno v. California*, 372 U.S. 627; *Fleming v. Mohawk Co.*, 331 U.S. 111, 119.

course of administrative action, on the basis of which private rights have become vested and to which all the responsible agencies of government have adjusted their activities. The question is not, this Court has repeatedly said, whether the court would have adopted the same interpretation as an original matter; but only whether there was a "reasonable" basis for the administrative interpretation. See, *e.g.*, *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473; *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153-154. To say in this case, as did the court of appeals, that the Secretary's interpretation of the withdrawal order was wholly "unreasonable" is to deprive that standard of meaning. The decision below, so based, is both plainly wrong and in conflict with the decisions of this Court.

4. What has been said would be controlling even if the question of interpretation went to a statutory or other limitation on the Secretary's power. In fact, the question here goes only to a matter of form. Admittedly, no statutory limitation is involved. And, while the 1941 withdrawal order was issued by the President, thus suggesting the presence of Presidentially-imposed limitations, the President soon rid himself of the function and delegated to the Secretary the full power to withdraw lands or to modify or revoke any existing withdrawals." With that del-

²⁴ Executive Order No. 10355 (17 F.R. 4831), issued in 1952, delegated to the Secretary authority, by public land orders, "to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the

2
 egregation of functions, the Secretary acquired plenary power over the status of the Range, and the 1941 Executive Order became, for all practical purposes, the Secretary's own order."

The question, then, is not one of power at all, but solely one of the Secretary's interpretation of his own order—that is to say, of words he had the power to change at will. No interests had become vested in reliance upon some other meaning of the words, and the Secretary's construction of them, whether or not grammatically "unreasonable," was of long standing, was open and notorious, was acquiesced in by Congress, was reflected in the regulations, was acted upon repeatedly, and was relied upon by innocent lessees in the investment of millions of dollars. Had the Secretary been able to foresee the court of appeals' ruling, he could readily have modified the order prior to the events in question to remove any doubt; he did not, only because to him its meaning was clear. In those circumstances, we submit, the construction followed by the Secretary in practice became a controlling gloss on the words. The Secretary had and in fact exercised the power to lease the Range during 1953-1957, and his alleged misuse of words in doing so, by which no rights were prejudiced, is simply beside the point. And surely a grammatical "error"

authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." That order replaced a somewhat more limited delegation made in 1943. See Exec. Order No. 9337, 8 F.R. 5516.

"The order applicable to the Cook Inlet area was issued after the delegation, so it was originally issued in the Secretary's name (see note 8, *supra*).

by the Secretary in construing words he has the power to change, affecting no other substantial interests, cannot justify sacrificing the interests of hundreds of innocent persons who, in reliance on his construction, have expended vast sums of money to acquire vested rights of enormous value."

There have been few occasions, we submit, in which a court has invalidated so extensive a course of administrative action and caused so serious a dislocation of vested rights with so little justification. Even apart from the vast interests at stake, certiorari would be warranted to correct so plain a judicial intrusion upon the administrative function.

III

THE LATENT JURISDICTIONAL QUESTION IS ALSO IMPORTANT

Because the court of appeals had previously rejected the argument in *Barash v. Seaton*, 256 F. 2d 714, we did not contend in the courts below that there was a lack of indispensable parties. There is authority, however, that the indispensable-party question is a "jurisdictional" one that may be noticed at any

²⁶ In defense of the court of appeals, it should be said that in originally deciding the case it was not informed of the impact its decision would have. The respondents' brief stated that no leases had been issued on the Range prior to 1958 and that the oil discovered in 1957 was not within the boundaries of the Moose Range (Br. 30, 40). The government's brief, unfortunately, failed to correct the misapprehensions. On the petition for rehearing and the motion for reconsideration, however, the court was fully informed both of the past leasing practices and of the extensive oil development, yet refused to reconsider the case.

time," and the question may thus remain in the case notwithstanding our failure to preserve it below. Even so, in view of the pressing need for a removal of the doubt created by the decision below over the ownership of the extensive oil lands in the Kenai Range, the government will urge the Court (should certiorari be granted and should the Court agree that the action is without merit) to dispose of the case on the merits without passing on the jurisdictional question, a course the Court has followed with some frequency in the past.²⁷ Since the Court may nevertheless find it necessary to reach the indispensable-party question, we take note of it here in order to apprise the Court of its presence and to show that it is an independently substantial and important question the presence of which does not detract from the need for review by this Court.

This suit is one to require the Secretary to issue oil and gas leases to respondents on some 25,000 acres of land on which oil and gas leases have already been issued to D. J. Griffin and other persons. The Griffin lessees were not joined as parties. They are, in our view, indispensable parties in whose absence the action may not proceed.

Since the very predicate of the respondents' claim (and of the court of appeals' decision) is that the

²⁷ See *Hoe v. Wilson*, 9 Wall. 501; *Brown v. Christman*, 126 F. 2d 625, 631 (C.A. D.C.); *Flynn v. Brooks*, 105 F. 2d 766, 767-768.

²⁸ *Ohio v. Helvering*, 292 U.S. 360, 368; *Bourdieu v. Pacific Oil Co.*, 299 U.S. 65, 70-71; *Brooks v. Dewar*, 313 U.S. 354, 359-360; cf. *Inland Empire Council v. Millis*, 325 U.S. 697, 700.

prior applications filed by the Griffin group were invalid, leaving respondents as the "first" qualified applicants entitled to the leases, it is evident that the interests of the Griffin lessees will be vitally affected by any judgment entered in this action. The other side of the indispensable-party coin is perhaps even more to the point: since no effective relief can be given without affecting the interests of the Griffin lessees, and since no judgment entered in their absence can bind them, without their presence the court lacks capacity to grant effective relief. Viewed either way, the most rigorous tests for determining whether a party is indispensable are met."

The court's lack of capacity effectively to decide the controversy without being able to bind the Griffin lessees may be readily seen by supposing that the court of appeals' judgment were allowed to become final, that the Secretary sought to cancel the Griffin leases in order to comply with it, and that the Griffin lessees obtained a final judgment in the Ninth Circuit (the likely forum) enjoining the Secretary from cancelling their leases (in a proceeding in which the respondents similarly were not made parties). The result would be precisely the sort of unseemly impasse (with the Secretary in the middle, subject to conflicting orders) that the indispensable-party rules are designed to avoid.

Quite apart from the questions of rudimentary power, moreover, sound judicial administration re-

"See, e.g., *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 164; *Shields v. Barrow*, 17 How. 129; *Brady v. Work*, 263 U.S. 435; *New Mexico v. Lane*, 243 U.S. 52.

quires the presence of the Griffin lessees to assure a fully adversary proceeding. In terms of the economic interests directly involved in this lawsuit, the real adversaries are the respondents on the one hand and the Griffin lessees on the other. The government's interests are defined by quite different considerations, looking more to the effective administration of the land laws than to the outcome in terms simply of who will end up holding the leases. In this instance, our views apparently coincide with the interests of the Griffin lessees, but that need not always be so, particularly with respect to all of the issues or arguments. To assure a full presentation of the issues in a proceeding such as this, it is essential that all three parties—the successful applicant, the unsuccessful applicant, and the Secretary—be before the court.

The question of the parties required to be joined in proceedings challenging the Secretary's grant or rejection of applications for oil and gas leases is an important and recurring one. While, as noted above, our primary purpose is to obtain a resolution of the issue on the merits, the latent presence of that additional question—and the consequent possibility that the merits may not be reached—at the very least does not counsel against the grant of review by this Court. To the contrary, the potentiality of inconsistent judgments resulting from the absence of the Griffin lessees as parties makes it all the more imperative that the judgment below not be allowed to stand.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WAYNE G. BARNETT,
STEPHEN J. POLLAK,
Assistants to the Solicitor General.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys.

FEBRUARY 1964.



APPENDIX A

THE DEVELOPMENT AND PURPOSE OF THE REGULATIONS

Even when withdrawn lands remain subject to leasing under the withdrawal orders, it is established that the Secretary has discretion to decline to issue leases, or to impose conditions on them, when necessary to prevent interference with the purposes for which the withdrawal was made.¹ The regulations establishing the leasing policies to be followed in wildlife refuges are an exercise of that power. Starting with the basic "multiple-use" policy followed by the Department in the administration of the public lands, they seek, by appropriately limiting or conditioning the grant of leases in wildlife refuges, to accommodate the two ends of protecting wildlife while fostering mineral development. The advocates of development and the advocates of conservation have, needless to say, differing views about how the balance is to be struck, and the development of the regulations, with the interim "suspensions" of final action on pending lease applications, reflects simply the continuing process of accommodating the opposing interests.

The regulation specifically governing oil and gas leasing in wildlife refuges (43 C.F.R. 192.9) was first adopted in 1947. In its original form (App. 10a), it provided simply that leases in wildlife refuges must be subject to an approved unit plan and must require

¹ *E.G., Haley v. Seaton*, 281 F. 2d 620 (C.A.D.C.).

the advance consent of the Secretary to any drilling or prospecting. On August 31, 1953, the Director of the Bureau of Land Management advised all regional administrators that "a possible revision of policy and regulations" on leasing in wildlife refuges was being studied and directed them in the meantime to "suspend action on all pending oil and gas lease offers" within such refuges. The direction was given by an internal, unpublished, memorandum and amounted simply to instructions given to subordinates on the action to be taken by them pending further advice. It in no way purported to, or did, prevent the issuance of leases with the approval of the national office, and leases on a number of different refuges (including the Kenai Range) were in fact issued during the so-called "suspension" period.² *A fortiori*, the unpublished memorandum in no way prevented the continued filing of lease offers on lands otherwise available for leasing.³ It was during this period that the Griffin applicants filed their offers.

On December 8, 1955, the anticipated revision of the refuge-leasing regulation was promulgated. The new regulation (App. 11a) was much more restrictive and gave increased power to the Fish and Wildlife

² See pp. 12-13, *supra*; *Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101*, 84th Cong., 2d Sess., pp. 92-93; *Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc.*, 84th Cong., 2d Sess., pp. 142-146; 102 Cong. Rec. A6581-A6583 (August 20, 1956).

³ That was made explicit in a subsequent memorandum from the Bureau to an Area Administrator, advising him that the 1953 memorandum did not "prevent the filing of new offers" and that all pending applications would "preserve their priority." BLM memorandum to Area Administrator, Area 4, August 12, 1955.

Service to regulate or veto refuge mineral development. It listed in an Appendix A a number of refuges (not including Kenai) in which no leasing at all would be permitted because of their importance to the preservation of rare species of plant or animal life. It then listed in Appendix B certain areas (including a small part of the Kenai Range) in which the Fish and Wildlife Service had determined that leasing, unless closely regulated, would jeopardize conservation purposes. In such areas, leasing was to be permitted only upon the approval by the Director of the Service of a "complete and detailed operating program for the area." In all other wildlife areas, the regulation provided, "Oil and gas leases may be issued" provided they contained specified conditions requiring approval by the Service of the type of prospecting conducted and requiring adoption of a unit plan approved by the Service. The main significance of the 1955 regulation for present purposes is that, in expressly including a part of the Kenai Range in the areas available for leasing only upon approval of a detailed operating plan and impliedly including the rest of the Range in the third category, it necessarily assumed the preexisting availability of the Range for leasing under the 1941 withdrawal order.

The 1955 regulation had the effect of terminating the prior "suspension" of leasing that had been directed pending its adoption. However, upon the almost immediate introduction in Congress of bills further to restrict leasing in wildlife refuges, upon which hearings were begun in January and February 1956,⁴ the field offices were directed to continue to withhold

⁴ See Hearings cited in note 2, *supra*.

final action on lease applications,⁵ and study of the leasing policy was resumed. Once again, of course, the "suspension" consisted simply of operating instructions to subordinates and, with appropriate internal (and sometimes Congressional⁶) approval, a significant number of leases on refuge lands (including Kenai) continued to be issued.

The final result of the controversy over the leasing policies to be followed in wildlife refuges was the adoption, on January 8, 1958, of a second complete revision of the regulation. The new regulation (App. 13a) was a major victory for the conservationists. It prohibited oil and gas leasing in most wildlife refuges altogether,⁷ conferring "sole and complete" jurisdiction over them to the Fish and Wildlife Service. The only exceptions (as to exclusively federal lands) were (1) lands withdrawn for a dual purpose (grazing and forage as well as wildlife conservation) and (2) wildlife refuges in Alaska. As to such lands, moreover, the Bureau of Land Management and the Fish and Wildlife Service were to reach agreements specifying the areas which "shall not be subject to oil and gas leasing" and the stipulations required to be included in leases issued on the remaining areas. The agreements were to become effective upon approval by the

⁵ Short-term interim suspensions were first directed by various interdepartmental communications. Then on March 30, 1956, the Bureau of Land Management by teletype directed that the suspension be continued until further notice, explaining that "This does not suspend all preliminary action which should continue to be taken. The suspension applies only to final actions in such matters."

⁶ See pp. 12-13, *supra*; H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12-13.

⁷ Unless leasing was necessary to prevent draining, 43 C.F.R. 192.9(b)(2).

Secretary and publication in the Federal Register. The regulation further provided that "Lease offers for such lands will not be accepted for filing [i.e., new lease offers] until the tenth day after the agreements * * * are noted on the land office records" and that "All pending offers or applications heretofore filed * * * will continue to be suspended until" the conclusion of the agreements.

Pursuant to the regulation, there was published in the Federal Register on August 2, 1958, an order of the Secretary announcing the agreement reached with respect to the Kenai Moose Range (App. 17a). The order decreed that certain lands within the Range (essentially, the southern half) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." It then provided:

The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers * * *. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation * * * will now be acted upon and adjudicated in accordance with the regulations.

* * * lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office * * *.[*]

* The Secretary recognized that most of the area had already been filed upon, and that in fact there would be little left available for new applicants. In announcing the order, he said: "Most of these lands are now covered by applications that will be adjudicated under the regulations of the Department." Department of Interior Press Release, July 25, 1958.

The agreement was noted in the Anchorage land office on August 4, 1958, and the respondents filed their applications on the tenth day after that, August 14, 1958.* Shortly after the order was issued, the Department, as announced, began processing the already-pending offers that had previously been suspended. Effective September 1, 1958, it granted leases on the lands in suit to the Griffin applicants on the basis of their offers that had been pending since January 1955. When in due course the new offers filed on August 14, 1958, were reached for adjudication, the respondents' offers were, as noted in the Statement, rejected on the grounds of the prior leasing.¹⁰

* The order, to avoid a race to the land office, provided that all offers filed within ten days after filing was permitted (*i.e.*, during August 14-24) would be treated "as having been filed simultaneously." Under the regulations, priority as among simultaneously-filed offers is to be determined by a drawing. 43 C.F.R. 295.8. In the drawing later conducted among the offers filed during the period August 14-24, the respondents' applications were the first drawn covering the land in suit, and they accordingly acquired a priority date as of August 14, 1958, and ahead of any other offers filed during that period. Their applications remained, of course, junior to any valid applications that had been previously filed and were already pending.

¹⁰ The circumstance that the lands had already been leased before the drawing was held among the offers "simultaneously" filed on August 14-24, 1958 (see note 9, *supra*), apparently thought bizarre by the court of appeals, is not unusual. Lease offers are processed in the order of filing and leases are issued as soon as an acceptable offer is reached. The pending lease offers were therefore acted upon before there was any occasion to examine the offers filed after August 14, 1958. The only purpose of the drawing later held, in turn, was to establish the order in which the offers "simultaneously" filed on August 14-24 would be processed. They could hardly have been processed (to see whether they conflicted with previously-issued leases) before the order of processing was established (*i.e.*, before the drawing).

From the terms and evolution of the regulations, it is evident that they have consistently taken as their premise that the wildlife refuges to which they applied—specifically including the Kenai Moose Range—were fully subject to mineral leasing under the withdrawal orders by which they were created. Their province has been to *restrict* the leasing activities otherwise permissible, with each version of the regulations prohibiting leasing altogether on larger and larger areas of refuge lands. For the court of appeals to hold, as it did, that the 1958 revision of the regulation (and the implementing order of August 2, 1958) “opened” the northern half of the Moose Range to leasing for the first time is thus a remarkable inversion: what the 1958 regulation and order did was, not to *open* the northern half of the Range, but to *close* the southern half.

The real significance of the regulations lies simply in their confirmation that the Department has from the beginning construed the 1941 Executive Order as not barring mineral leasing and has acted consistently with that construction throughout the period involved here. The 1955 regulation confirmed that understanding by its express mention of the Kenai Range, and the 1958 regulation (and its implementing order) even more pointedly confirmed it by specifically directing the resumption of processing of lease offers previously filed on the Kenai Moose Range. The regulation constitutes, in short, a formal reaffirmation of the consistent administrative construction—repeatedly acted upon by the Department, repeatedly relied upon by the lessees, and repeatedly endorsed by Congress—that the 1941 Executive Order did not forbid mineral leasing.

APPENDIX B

STATUTES, ORDERS, AND REGULATIONS INVOLVED

1. STATUTES

Sections 1 and 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by 60 Stat. 950 (30 U.S.C. 181, 226):

SEC. 1. Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. * * *

SEC. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *. When the lands to be leased are not

within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under said sections shall be entitled to a lease of such lands without competitive bidding. * * *

2. WITHDRAWAL ORDERS

a. Executive Order No. 8979, December 16, 1941 (6 F.R. 6471):

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area, presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the herein-after-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:

* * * * *

None of the above-described lands excepting Tps. 5 N., Rsl. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of

public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 860-861, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: * * *

b. Public Land Order No. 487, June 16, 1948 (13 F.R. 3462):

By virtue of the authority vested in the President by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U.S.C. Title 43, secs. 141-143), and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the public lands within the following-described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation: [Description omitted; includes, *inter alia*, most of the area excepted from Executive Order No. 8979, *supra*.]*

3. REGULATIONS AND IMPLEMENTING ORDER

a. As originally issued on October 29, 1947 (12 F.R. 7334), § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9) provided:

§ 192.9 *Leases for wildlife refuge lands.*
No noncompetitive oil and gas lease under the act will be issued for lands within a wildlife

*Public Land Order No. 487 was revoked on September 9, 1955 by Public Land Order No. 1212 (20 F.R. 6795). The leases in that area which conflict with respondent Coyle's application were, however, issued on applications filed while Order No. 487 was still in force, and it is on that basis that the court of appeals held them invalid.

refuge (a) unless those lands are subjected to an approved cooperative or unit plan, and (b) unless the lease contains a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish and Wildlife Service. Subject to the same two conditions, competitive leases also may issue for refuge lands. Even if these conditions are not met, competitive leases may nevertheless issue if Fish and Wildlife Service reports that oil and gas development may be conducted without destroying the usefulness of the lands as a sanctuary for wildlife, or, in the absence of such a report, wherever the Secretary determines that the national interest in securing the contemplated oil and gas production outweighs the importance of maintaining the refuge as a sanctuary for wildlife.

b. As revised on December 8, 1955 (20 F.R. 9009), § 192.9 of the Regulations provided:

§ 192.9 *Leasing of wildlife refuge lands.*

(a) Geological and geophysical prospecting permits may be issued by the Fish and Wildlife Service on areas subject to its jurisdiction prior to leasing under such terms and conditions as that Service may prescribe.

(b)(1) Areas determined to be indispensable for the preservation of rare or endangered species, remnant big-game herds, and irreplaceable examples of unique animal or plant ecology are not available for leasing. Areas in this category at present are included in Appendix A. Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service

reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness; recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

(2) The following conditions shall be expressed in any lease issued under this section:

(i) Geological and geophysical prospecting conducted on the leased premises shall be of a type and at a time satisfactory to the Fish and Wildlife Service.

(ii) No drilling operations shall be conducted under the lease until such lease has been committed to an approved unit plan. However, the Secretary may, in his discretion, permit or require drilling if he determines that a unit plan including the leased area cannot be secured and that drilling is necessary to protect the interests of the United States.

(a) A unit agreement which includes lands administered for wildlife conservation shall contain a provision that no drilling operations may be conducted on the unitized portion of the Government-leased lands administered for wildlife conservation without the consent and approval of the Fish and Wildlife Service as to the time, place, and nature of such operations.

(b) In every instance, a plan of development which includes lands administered for wildlife conservation shall not be approved

without the concurrence of the Fish and Wildlife Service.

(iii) Lessees shall observe and comply with all State and Federal laws and regulations relating to wildlife and shall take such action as is necessary to assure observance and compliance with these laws and regulations by lessees, employees and agents.

APPENDIX A—FISH AND WILDLIFE SERVICE LANDS NOT AVAILABLE FOR LEASING

APPENDIX B—FISH AND WILDLIFE SERVICE LANDS AVAILABLE FOR LEASING UNDER A SATISFACTORY DEVELOPMENT AND OPERATING PLAN

Kenai: The following areas and all lands within one mile of Tustumena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

c. As revised on January 8, 1958 (23 F.R. 227) and now in force (43 C.F.R. 192.9 (1963)), § 192.9 of the Regulations provides:

§ 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands—(a) Definitions—(1) Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(2) *Game range lands.* Game ranges created by a withdrawal of public lands and reserved for dual purposes, namely protection and improvement of the public grazing lands and natural forage resources and conservation and development of natural wildlife resources, are under the joint jurisdiction of the Bureau of Land Management and the United States Fish and Wildlife Service.

(3) *Coordination lands.* These lands are withdrawn or acquired by the Government and made available to the States by cooperative agreements entered into between the United States Fish and Wildlife Service and the game commissions of the various States, in accordance with the act of March 10, 1934 (48 Stat. 401), as amended by the act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the United States Fish and Wildlife Service as the custodial agency of the Government.

(4) *Alaska wildlife areas.* Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service.

(b) *Leasing policy and procedure.* (1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (2) of this paragraph.

(2) In instances where it is determined by the Geological Survey that any of the lands mentioned in paragraph (a)(1), or any of the lands mentioned in paragraph (a)(2), (3) and

(4) of this section and defined in this section as not available for leasing are subject to drainage, the Bureau of Land Management, with the concurrence of the United States Fish and Wildlife Service, will process an offering inviting competitive bids in accordance with the then existing regulations relating to competitive oil and gas leasing. Such leases shall be issued only upon approval by the Secretary of the Interior and shall contain such stipulations as are necessary to assure that leasing activities and drilling shall be carried out in such a manner as will result in a minimum of damage to wildlife resources.

(3) As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. As to coordination lands, representatives of the Bureau of Land Management and the United States Fish and Wildlife Service will, in cooperation with the authorized members of the various State game commissions, confer for the purpose of determining by agreement those lands which shall not be subject to oil and gas leasing.

(4) The remaining lands in paragraph (a) (2) and (4) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management. The remaining lands in paragraph (a) (3) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the State Game Commission, the

United States Fish and Wildlife Service, and the Bureau of Land Management.

(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b)(3) of this section shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil and gas leasing, together with a statement of the stipulations agreed upon by the parties thereto for inclusion in such leases to assure that all operations under the lease shall be carried out in such a manner as will result in a minimum of damage to wildlife resources. The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management where they may be inspected by the public at the usual hours specified for that purpose. Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

(d) *Suspension of pending applications.* All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed.

(e) *Lands in requested withdrawal.* All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the consummation of the withdrawal, and thereafter such offers shall be considered in accordance with the provisions of this section.

d. The Order of the Secretary of the Interior published in the Federal Register of August 2, 1958 (23 F.R. 5883) provides in pertinent part:

Notice is hereby given that, pursuant to the regulation 43 CFR, 192.9 (Circular 1990), agreement as reflected by the map herein referred to, has been consummated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. The lands excluded from leasing are specifically delineated on the map of the Kenai National Moose Range, set forth below, which was approved on January 29, 1958, and are identified on said map as follows:

Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:

[Description omitted; essentially the southern half of the Range.]

The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (41 Stat. 437), and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.

All offers to lease must be submitted on Form 4-1158 and in accordance with the regulation 43 CFR 192.42, accompanied by a \$10

filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85-505 enacted July 3, 1958.

In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8.

All leases will be subject to the special stipulations (Form 4-1383) approved April 18, 1958 and published in the Federal Register April 22, 1958 (23 F.R. 2636, 2637).

FRED A. SEATON,
Secretary of the Interior.

JULY 24, 1958.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
APPELLEE

*Appeal from the United States District Court for the
District of Columbia*

Decided September 19, 1963

Before WILBUR K. MILLER, BASTIAN and MCGOWAN,
Circuit Judges.

BASTIAN, *Circuit Judge*: This is an appeal from summary judgment of the District Court in favor of the Secretary of the Interior in an action to review his decision rejecting appellants' applications for oil and gas leases on land within the Kenai National Moose Range in Alaska.

Since appellants' main attack is on the Secretary's authority to draw various historical conclusions, the chronology of the creation of the moose range and its opening for oil and gas leasing is necessary.

The Kenai National Moose Range was established by Executive Order No. 8979¹ of December 16, 1941. The order, which covered all but a small part of the

¹ 6 Fed. Reg. 6471.

subject lands, withdrew and reserved the area for the protection of the Kenai moose and provided that none of the lands:

shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the Act of July 3, 1926 * * * 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927 * * * 44 Stat. 1452, U.S.C., title 48, secs. 471-471o.

Subsequently, Public Land Order No. 487^{*} of June 16, 1948, withdrew the portion of the subject lands excepted by the 1941 Executive Order.

Between October 15, 1954, and January 28, 1955, certain parties filed applications for oil and gas leases on lands covered by the 1941 and 1948 orders. No immediate action was taken on these applications because, in 1953, the Director of the Bureau of Land Management had suspended action on all *pending* oil and gas lease offers until completion of a study of possible changes in policy and regulations related to the issuance of oil and gas leases within wildlife refuges. Ultimately, these parties were awarded leases on the land in question.

In 1955 the Government began to restore the Kenai National Moose Range to certain private acquisition.

* 18 C.F.R. 3462. The order stated:

Subject to valid existing rights, the public lands [described] in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation.

This order shall take precedence over, but shall not modify * * * the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941. * * *

First, Public Land Order No. 487 was revoked by Public Land Order No. 1212³ of September 9, 1955, which provided initially that a small piece of land (not involved in the present suit) was:

2. Subject to valid existing rights * * * withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. * * *

The order then proceeded to deal with the remainder of the land restored. After granting preference for homesteading, it provided:

6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws * * *

7. Commencing at 10:00 a. m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral-leasing laws. * * *

On October 4, 1955, Public Land Order No. 1212 was amended⁴ to delete the provisions for leasing under the mineral-leasing laws appearing in paragraphs 6 and 7 of the order.

³ 20 Fed. Reg. 6795.

⁴ 20 Fed. Reg. 7904.

Finally, on January 8, 1958, an amendment to 43 C.F.R. 192.9⁵ provided:

(b) *Leasing policy and procedure.* * * * (3) As to * * * Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. * * *

(4) The remaining lands * * * not closed to oil and gas leasing will be subject to leasing. * * *

(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b)(3) of this section shall be published in the Federal Register. * * * The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management. * * * Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

The Bureau of Land Management and the Fish and Wildlife Service concluded their agreement and it was approved by the Secretary of the Interior. The order of the Secretary was published on August 2, 1958⁶ designating the lands in the Moose Range which were not subject to oil and gas leasing, and providing that the balance of the lands within the

⁵ This regulation provided a comprehensive plan for oil and gas leasing of wildlife refuge lands, including the Kenai National Moose Range.

⁶ 23 Fed. Reg. 5883.

Range were subject to the filing of oil and gas lease offers. The order stated:

Offers to lease covering any of these lands which have been pending and upon which action was suspended * * * will now be acted upon and adjudicated in accordance with the regulations.

The order also stated that all lease offers filed within ten days after the date established by regulation 43 C.F.R. 192.9 for acceptance for filing would be treated as simultaneously filed, and further:

The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedures outlined in the regulation 43 C.F.R. 295.8.

On or after August 14, 1958, appellants filed their respective offers to lease pursuant to § 17 of the

43 C.F.R. 295.8:

Processing of simultaneous applications. All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. * * *

(b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations.

* All of the appellants, except Waldo E. Coyle, filed their offers for land covered by Executive Order No. 8979 of

Mineral Leasing Act, as amended, 30 U.S.C. § 226 (Supp. III, 1958).

Some time after appellants' applications had been filed, the Department of the Interior, without notice to appellants, issued leases for the lands in question to the representatives of major oil companies based on offers filed by them between October 15, 1954, and January 28, 1955, as above stated.

On September 4, 1959, a little more than a year after the filing of appellants' offers, a public drawing was held to determine the priorities between simultaneously filed oil and gas lease offers pursuant to the provisions of 43 C.F.R. 295.8. Appellants prevailed in this public drawing, in which the oil companies were not represented. But their victory was short-lived, for their lease offers were rejected by the Anchorage Land Office on the grounds that they conflicted with the leases issued the previous fall.

Appellants duly appealed to the Director of the Bureau of Land Management, where their appeals were denied in decisions rendered in July, 1960. Appeals from these decisions were taken to the Secretary of the Interior and were rejected by a deputy solicitor of the Department in an opinion dated September 1, 1961, granting leases within the Range based on the 1954 and 1955 offers. A petition for the exercise of supervisory authority by the Secretary of

December 16, 1941. Coyle filed an offer for land originally excluded by that order but subsequently included in Public Land Order No. 487 of June 16, 1948. The land covered by the 1948 order was opened to oil and gas leasing by Public Land Order No. 1212 of September 9, 1955, as modified by the amendment of October 14, 1955. The applicants awarded priority over Coyle filed their offers prior to Order No. 1212, so the question presented by Coyle is whether Order No. 487 closed the land to oil and gas leasing.

the Interior was filed on February 15, 1962. This petition was denied *on the merits* on April 25, 1962. Thereafter, and on June 8, 1962, appellants filed this suit in the District Court against the Secretary of the Interior. The Secretary first filed a motion to dismiss based on the ninety-day statute of limitations contained in 30 U.S.C. § 226-2 (Supp. III, 1958). Then both sides moved for summary judgment. The District Court granted the motion of the Secretary for summary judgment and denied the motions of appellants for summary judgment, specifically stating that the ground of noncompliance with the statute of limitations did not form a part of his decision, and further specifically denying the Secretary's motion to dismiss based, as stated, on the ninety-day statute of limitations. Appellants appealed to this court on December 31, 1962.

Appellants' principal contention is that the 1941 Executive Order closed to oil and gas leasing the land in the Kenai National Moose Range covered by that directive, and that this land remained closed until it was opened by the amendment of 43 C.F.R. 192.9 in January 1958. They argue that the order prohibits "disposition [of any lands within the Range]. (except for fish trap sites) under any of the public-land laws applicable to Alaska," and, since the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, is a "public-land law applicable to Alaska," it follows that oil and gas leasing under that Act is prohibited.

We think the Executive Order clearly did remove the land involved from oil and gas leasing and appellants' contention in this regard is correct. And there is no doubt that the Mineral Leasing Act of 1920 is a public-land law applicable to Alaska.*

* 43 C.F.R. 71.1 (1954).

The Secretary argues, however, that the acts of July 3, 1926, and March 4, 1927, specifically included in the 1941 order, are also public-land laws applicable to Alaska, and that, consequently, the order could not have been designed to include all such public-land laws but only those laws relating to the complete alienation of the title of the United States in the land. The Secretary argues that, since the Mineral Leasing Act does not provide for the alienation of the title of the United States, and since the order did not expressly withdraw the lands from the operation of that Act, the land covered by the 1941 order was open to oil and gas leasing in 1954 and 1955, when the offers conflicting with appellants' offers were filed.

There are persuasive counter-arguments to the Secretary's contentions. As the deputy solicitor himself noted, the acts specifically included in the Executive Order, unlike the Mineral Leasing Act, are not public-land laws of general applicability throughout the United States but are laws applicable only to Alaska. We think the phrase "public-land laws applicable to Alaska" means those laws of general applicability throughout the country which are made applicable to Alaska by the act of August 24, 1912, 37 Stat. 512, 48 U.S.C. 23, 43 C.F.R. 51.1; otherwise, the order would not have included the two acts specifically mentioned.

The specific exemption for fish trap sites in the order strengthens our conviction. If the order were designed to cover only the total alienation of the interest of the United States, then specification of fish trap sites would be unnecessary, for permission to fish by traps is acquired not by deed but by a license, similar in many respects to a lease. Furthermore, the specific inclusion of one exception in the

order indicates that other exceptions should not be implied (as the Secretary urges) but that the prohibition on disposition should be read in an expansive manner.

Appellants make copious reference to the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141, pointing out the similarity between the wording of that statute and the Executive Order of 1941 and the Public Land Order of 1948. Using this evident similarity, they urge that the cases which have construed the Pickett Act to permit the President to withdraw public lands from oil and gas leasing¹⁰ also provide judicial interpretation of the 1941 and 1948 orders. The cases dealing with the Pickett Act certainly are not dispositive of the question before us, but they are not wholly irrelevant since they do indicate that it is more likely that these words were used to provide expansive coverage rather than the narrow coverage the Secretary now urges.

In sum, we hold, as to all appellants other than Coyle, that the lands in the Kenai National Moose Range were closed to oil and gas leases by the terms of the order creating the Range in 1941 until it was opened on August 2, 1958. Accordingly, the leases issued to parties other than those appellants were a nullity because applications therefor were filed prior to the opening of the Range to leasing. While the lands filed on by the appellant Coyle present a somewhat different picture from those of the other appellants, no material difference exists between his claim and theirs. The lands on which Coyle filed were

¹⁰ *Bordieu v. Pacific Western Oil Co.*, 299 U.S. 65 (1936); *Wilbur v. United States ex rel. Barton*, 60 App. D.C. 11, 46 F. 2d 217 (1930), *aff'd sub nom. United States ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931).

originally opened by the 1941 order, but they were closed in 1948 by Order No. 487 and remained closed during the time the offer conflicting with his application was filed. These excepted lands were reopened by Order No. 1212 on September 9, 1955, but no new offers were filed thereafter on the lands covered by the Coyle application. As to the lands filed on by Coyle, we hold that the leases issued to parties other than Coyle were a nullity because applications therefor were filed prior to the opening of the Range to oil and gas leasing.

In reversing the Secretary's interpretation of the 1941 order creating the Kenai National Moose Range, we are aware of the discretion granted agencies in the interpretation of statutes and presidential orders in areas committed to their administration. Deference to agencies does not reach the extent of sanctioning irrational agency action, however; nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the agency's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable. In the case before us the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand.

The Secretary concedes that, if this court determines that any of the orders closed the Moose Range to oil and gas leasing, the only possible defense would be based on 30 U.S.C. 226-2, which provides:

No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.

Admittedly, appellants commenced this action more than five months after the order of the deputy solicitor, acting for the Secretary of the Interior, was filed. However, on April 25, 1962, the Secretary entertained and denied appellants' petition for the exercise of supervisory authority; and the present action was filed within ninety days thereafter. The Secretary argued before the District Court, and again argues before us, that the ninety-day statute of limitations bars this action.

We think the Secretary's reliance on the statute of limitations is without merit. The principle which governs this question is set down in *Outland v. Civil Aeronautics Bd.*, 109 U.S. App. D.C. 90, 284 F. 2d 224 (1960).¹¹

When a party elects to seek a rehearing there is always the possibility that the order complained of will be modified in a way which would render judicial review unnecessary. Practical considerations, therefore, dictate that, when a petition for rehearing is filed, judicial review may be properly deferred until the petition has been acted upon. We hold, in the circumstances presented here, that the time for filing a petition for judicial review did not begin to run until the petition for rehearing had been acted upon.

The Secretary argues that this rule applies "only where the rules of practice of an administrative agency provide for a petition for rehearing or reconsideration and when one is timely filed." He argues that "there is no provision by statute or regulation

¹¹ See also *Montship Lines v. Federal Maritime Board*, 111 U.S. App. D.C. 160, 295 F. 2d 147 (1961). *Safeway Stores v. Coe*, 78 U.S. App. D.C. 19, 136 F. 2d 771 (1943) is not in point, for in that case the Secretary did not lose his jurisdiction to decide on the merits the question presented in the petition.

permitting, much less giving, the right to file a petition for reconsideration [of a decision by the deputy solicitor]." A petition to the Secretary for the exercise of supervisory authority is a long standing procedure within the Department of the Interior, which, although not spelled out by statute or regulation, serves many of the same purposes of a petition for rehearing.

The Secretary correctly points out that he has the right to exercise his supervisory power so long as the property in question remains within his jurisdiction. Thus he argues that the time for petitioning for the exercise of his supervisory power might be limitless and the provisions of 30 U.S.C. 226-2 rendered nugatory, for a party losing a decision in the Department could delay his entry into court indefinitely by delaying his petition for the exercise of supervisory power. This argument fails to consider the power of the Secretary to formulate his own rules concerning the submission of the petition. The Secretary can prevent undue delay by setting time limits on these petitions. He is not at the mercy of the losing party, but he can force that party, by appropriate rules or adjudication, to bring petitions for the exercise of supervisory power within a certain time.

In the present case, the Secretary did not reject appellants' petition because it was filed too late, but, rather, he rejected it on the merits. The letter rejecting appellants' petition cannot be read as "an orderly manner of indicating that the [original] communication had been received," but must be read as a rejection of the petition on the merits. Under the circumstances, we believe that appellants may seek review of the order of the Secretary within ninety days after the final rejection of their application on the merits. This they have done.

A different result might well be reached had the Secretary rejected appellants' petition for the exercise of supervisory authority on the ground that it was filed too late; but as stated, he did consider it and denied it on the merits.

It follows that the action of the District Court should be reversed, and judgment entered for appellants.

Reversed.

MCGOWAN, *Circuit Judge*, with whom *Circuit Judge WILBUR K. MILLER* joins, *concurring*: We concur fully in the reasons set forth by Judge Bastian for the reversal of the judgment of the District Court. We believe, however, that there is an additional ground why the appellee may not, in this court, press the claim that the statute of limitations bars the relief sought by appellants.

It is clear, in our view, that the District Court passed upon the statute of limitations point adversely to the appellee. The record shows that two separate motions were filed in the District Court by the appellee: one, a motion for summary judgment on the merits, in which was included a statute of limitations ground, and, two, a motion to dismiss the complaint based solely upon the statute of limitations. In its memorandum opinion granting the first such motion, the District Court expressly excepted "that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations * * *," and stated that that part "should not form part of the basis for the granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied." In the judgment subsequently entered pursuant to this memorandum, the ordering

portions recited explicitly that "Defendant's motion to dismiss is denied." The appellee has taken no appeal from this part of the judgment adverse to him.

In the absence of such an appeal, we do not believe that appellee is free to raise the statute of limitations here as a basis of affirmance. Our conclusion in this regard rests on authority of long standing. In *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), Justice Cardozo, speaking for a unanimous court, said that "[T]he rule is inveterate and certain." There, the plaintiff surety had sought specific performance of a contract supplemental to an agreement of suretyship, or alternatively, exoneration by the contractor of the surety from loss on unpaid bills. The District Court held the surety not entitled to the specific performance requested, but did grant the relief of exoneration. It entered a decree reflecting these dispositions. The contractor appealed from the grant of exoneration, but no cross-appeal was taken by the surety from the denial of specific performance. The Court of Appeals concluded that specific performance, rather than exoneration, was the proper relief and sent the case back with directions to the District Court to revise its judgment to this end.

The Supreme Court held that it was error for the Court of Appeals to take this action at the instance of a nonappealing, albeit successful, litigant. It cited a number of cases, including an early decision of the Supreme Court, wherein it was said:

"Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be

heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken." *The Maria Martin*, 12 Wall. 31, 40-41.

One of the cases relied upon by Justice Cardozo was *Peoria & Pekin Union Ry. Co. v. United States*, 263 U.S. 528 (1924). There, the United States had prevailed below on the merits, but it had also contended in the lower court that the venue was improperly laid. This latter point was resolved against it, but on appeal it was renewed. Justice Brandeis, speaking for the entire court, said (at p. 536) that " * * * by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered."

This court has recognized this principle. In *Wisconsin Bankers Association v. Robertson*, 111 U.S. App. D.C. 85, 294 F. 2d 714, *cert. denied*, 368 U.S. 938 (1961), the case was litigated below both on the merits and on a challenge to plaintiff's standing to sue. The defendants prevailed on the former, but suffered an adverse ruling on the latter. The standing point was renewed on appeal, but this court said: "As a cross appeal was not filed by the appellees, we cannot consider, and therefore express no opinion concerning, their argument that the District Court erred in holding that appellants had standing to sue. In the absence of a cross appeal, an 'appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary * * *.' *United States v. American Ry. Exp. Co.*, 1924, 265 U.S. 425, 435, 44 S. Ct. 560, 564,

68 L. Ed. 1087 * * *¹² See also, *Whitehead v. American Security & Trust Co.*, 109 U.S. App. D.C. 202, 285 F. 2d 282 (1960).

It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings.

The defense of the statute of limitations is not jurisdictional and it may be waived at any time. By failing to appeal from the denial of his motion to

¹² 111 U.S. App. D.C. at 86, 294 F. 2d at 715. The *Railway Express* case appears to have involved a situation where the lower court did not in fact decide or pass upon the ground sought to be raised on appeal. In this situation the successful litigant may well be able to renew the point on appeal as a basis of affirmance. Justice Brandeis reaffirmed the force of the *Peoria & Pekin Union Ry.* holding by this reference (n. 11 on p. 436 of 265 U.S.): "* * * There the objection upon which the appellee relied was one of venue. The District Court overruled it; and then dismissed the bill on the merits. An objection to venue can be waived at any stage of the proceedings. This Court held that it was waived by failure to take a cross-appeal."

dismiss founded upon the statute, the appellee here made such a waiver and cannot now attack that part of the judgment with which he disagrees.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to enter judgment for appellants.

PER CIRCUIT JUDGE BASTIAN.

Dated: September 19, 1963.

ORDER OF OCTOBER 16, 1963

[Caption omitted]

Before: WILBUR K. MILLER, BASTIAN AND MCGOWAN,
Circuit Judges, in Chambers

ORDER

On consideration of appellee's petition for rehearing, and of appellants' answer thereto, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

Dated: October 16, 1963.

ORDER OF NOVEMBER 8, 1963

[Caption omitted]

Before: WILBUR K. MILLER, BASTIAN and MCGOWAN,
Circuit Judges, in Chambers

ORDER

On consideration of appellee's motion for leave to file motion for reconsideration, and it appearing that appellee's motion for reconsideration of denial of petition for rehearing has been lodged with the Clerk, it is

ORDERED by the Court that the aforesaid motion for leave to file be granted, and the Clerk is hereby directed to file appellee's motion for reconsideration of denial of petition for rehearing in this case, and on consideration whereof, it is

FURTHER ORDERED by the court that appellee's motion for reconsideration of denial of petition for rehearing is denied.

Per Curiam.

Dated: November 8, 1963.

INDEX

	Page
Question Presented	1
Counterstatement of the Case	3
Reasons for Denying the Writ:	
I. The court of appeals correctly construed the Moose Range lands involved in this case as closed to oil and gas activity until the Secre- tary's order of August 2, 1958, through exam- ining the Secretary's pattern of administration thereof and from controlling law	12
A. The administration of the Range is consist- ent with the holding below	13
B. The Range was closed under the plain mean- ing of the 1941 order and under the construc- tion of similar language by the courts	15
II. The court of appeals decision affects only the right of ten leases within the Kenai Moose Range in Alaska	19
III. There is no indispensable party issue warrant- ing review by this Court	23
A. The oil companies are not indispensable parties	23
B. The oil companies voluntarily declined to intervene as parties to the judicial proceed- ings below	25
Conclusion	27

CITATIONS

CASES:

<i>Barash v. Seaton</i> , 256 F.2d 714 (D.C. Cir. 1958)	23
<i>Boesche v. Udall</i> , 373 U.S. 472 (1962)	24
<i>Bordieu v. Pacific Western Oil Co.</i> , 299 U.S. 65 (1936) ..	18
<i>California v. Taylor</i> , 353 U.S. 553, 557, n. 2 (1957) ...	23
<i>Cherokee Nation v. Hitchcock</i> , 187 U.S. 294 (1902) ...	23

	Page
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1957)	24
<i>Consolidated Edison Co. v. NLRB</i> , 305 U.S. 497, 218 (1938)	22, 26
<i>D. Miller</i> , 60 I.D. 161 (1948)	19
<i>Kinney Coastal Oil Company v. Kieffer</i> , 277 U.S. 488 (1928)	16, 19
<i>Lawn v. United States</i> , 355 U.S. 339, 362, n. 16 (1958)	23
<i>McKay v. Wahlenmaier</i> , 226 F.2d 35 (D.C. Cir. 1955)	23
<i>Noel Teuscher</i> , 61 I.D. 210	19
<i>Opinion of the Solicitor</i> , 48 I.D. 459 (1921)	19
<i>Safarik v. Udall</i> , 304 F.2d 944 (D.C. Cir. 1962), cert. denied 371 U.S. 901	22, 26
<i>Seaton v. The Texas Co.</i> , 256 F.2d 718 (D.C. Cir. 1958)	24, 26
<i>Thomas v. Union Pac. R.</i> , 139 F. Supp. 588 (D. Colo. 1936), aff'd per curiam 239 F.2d 641 (10th Cir. 1956)	25
<i>Thor-Westlife Development, Inc. v. Udall</i> , 314 F.2d 257 (D.C. Cir. 1963), cert. denied 373 U.S. 951 ...	11
<i>Wilbur v. United States ex rel. Barton</i> , 46 F.2d 217 (D.C. Cir. 1930), affirmed 283 U.S. 414 (1931)	17, 18, 19
<i>Work v. Louisiana</i> , 269 U.S. 250 (1925)	23

STATUTES AND REGULATIONS:

<i>Alaska Submerged Lands Act of July 3, 1958</i> , 72 Stat. 322, § 6	14
<i>Mineral Leasing Act of 1920</i> , 41 Stat. 437, as amended, 30 U.S.C. 181 et seq.:	
§ 17	17, 21
30 U.S.C. 226-2 (Public Law 86-705, 74 Stat. 790)	21, 26
<i>Pickett Act of June 25, 1910</i> , 26 Stat. 847, 43 U.S.C. 141-142	17
62 Stat. 935 (1948), 28 U.S.C. § 139 (1958) (Venue over Secretary of Interior)	25
Public Law 97-478, 76 Stat. 744 (1962), 28 U.S.C. §§ 1361, 1391(3) (Supp. 1962) (Venue over Secretary of Interior)	26

Index Continued

iii

Page

Revisions to 43 C.F.R. 192.9:

20 F.R. 9009	7
23 F.R. 227	9, 19-20
Public Land Laws Applicable to Alaska, 43 C.F.R. 51. . .	4, 16
Mineral Leasing Act Applicable to Alaska, 43 C.F.R.	
71.1	16
Simultaneous drawing regulation, 43 C.F.R. 295.8 ...	11

MISCELLANEOUS:

Executive Order No. 8979, 6 F.R. 6471	2, 3, 13, 18
Executive Order No. 10355, 17 F.R. 4831	20
Public Land Order 487 of June 16, 1948 (13 F.R. 3462)	5, 6
Public Land Order 1212 of September 9, 1955 (20 F.R.	
6795)	6, 7
Secretary of the Interior Press Release, January 29,	
1958	9, 15
Secretary of Interior's Order of August 2, 1958, 23	
F.R. 5883	10
Hearings before the House Committee on Merchant	
Marine and Fisheries on H.R. 5306, etc., 84th	
Cong., 2d Sess.	14
Hoffman, <i>Oil and Gas Leasing on the Public Domain</i>	
(1951)	19

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

—
No. 813
—

STEWART L. UDALL, Secretary of the Interior, *Petitioner*

v.

JAMES K. TALLMAN, ET AL., *Respondents*

—
On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit.
—

BRIEF FOR THE RESPONDENTS IN OPPOSITION

—
QUESTION PRESENTED

The petitioner's predecessor in office issued an order on August 2, 1958 making that part of the Kenai National Moose Range in Alaska here in dispute available to oil and gas leasing and requiring a drawing to settle the priority of all conflicting lease offers. Until then, the bulk of the Range, under the order establishing it in 1941 had been withdrawn from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public land laws applicable in Alaska." Respondents made timely application pursuant to the terms of the

August 2 order on August 14, 1958, for ten individual leases of 2,500 acres each. At the drawing held about a year later the respondents were selected as the first applicants for these lands. They were not granted leases, however, because leases covering the same 25,000 acres had already been issued by the Land Office to oil company representatives sometime soon after the order of August 2, 1958 was issued, based on lease offers made in 1954 and 1955. Thus the question arises:

Whether respondents who were the first qualified applicants to file for leases of about 2,500 acres each on lands in the Kenai National Moose Range after those lands were made available for leasing by the Secretary in 1958, are entitled to leases ahead of others who filed lease offers in 1954 and 1955 at a time when the lands were withdrawn by an express Executive Order (No. 8979, December 16, 1941 (6 F. R. 6471)) from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public land laws applicable in Alaska."¹

¹ The respondents presented two other alternate grounds for reversal of the Department's action in this case which the court of appeals did not reach, because of its unanimous decision in respondents' favor on the question stated above:

Whether, regardless of the meaning of the 1941 Executive Order, the Secretary has acted arbitrarily in failing to comply with his own order setting up the specific procedures for determining priority of offers and by according priority to oil and gas lease offers filed in defiance of Departmental suspension orders.

Whether leases issued by the Department on the lands in dispute at rentals of 25 cents an acre were null and void as contrary to Public Law 85-505 of July 3, 1958 requiring payment of 50 cents an acre.

Petitioner's reference in footnote 2, p. 2 to a proposed issue of whether the oil companies are "indispensable parties," which was not raised at any stage below and which he does not ask the Court to consider (Pet. 18), poses no proper question for review (see pp. 23-26 *infra*).

COUNTERSTATEMENT OF THE CASE

Contrary to the broad "consequence" seen by the petitioner, the District of Columbia Circuit made no ruling that all the leases within the Kenai National Moose Range are subject to cancellation. All that the court below decided was that the ten respondents were entitled to individual leases aggregating about 25,000 acres over conflicting applications on the same acreage filed by representatives of the oil companies² which seek to be heard here as amici curiae. In reaching this result the court of appeals had before it all of the specific orders and actions thereunder by the Department dating back to 1941 relating to the Kenai National Moose Range, as well as the Departmental regulations pertaining to wildlife refuges in general. Most of this detailed history is not discussed in the petition despite the clear indication at the outset of the opinion below that this chronology was essential to the decision.³ The major events in sequence may be outlined as follows:

The order of December 16, 1941. President Roosevelt by Executive Order No. 8979 of December 16, 1941 (6 F. R. 6471; Pet. App. 9a) established the Kenai National Moose Range. The special purpose of the withdrawal to protect the unique species of giant Kenai moose was expressly stated in the order as follows:

• • • for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has

² Although referred to as the "Griffin group" by petitioner, the motion for leave to file amicus makes it clear that this group is in fact composed of the major oil companies.

³ Pet. App. 19a. Appendix A of the petition contains an argumentative analysis of the general regulations; not the specific actions and orders.

considerable local economic value, all of the herein-after-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, *withdrawn and reserved* for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose. * * *

After describing all of the lands within the Range, the order excepted only a certain designated portion from closure under the public-land laws:

*None of the above-described lands excepting Tps. 5N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, * * ** *Provided, however, That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: * * ** (Emphasis supplied.)

The Director of the Fish and Wildlife Service commenting on the purpose of the Range prior to its establishment by the President made clear the intent of the order that only the excepted portion would be available for use or disposition under the Alaska public land laws:

* * * The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available

⁴ There is no argument or doubt that the Mineral Leasing Act of 1920, which governs federal oil and gas leasing activity is one of the "public-land laws applicable to Alaska" (Pet. App. 25a). See 43 C.F.R. § 51—Public Land Laws Applicable to Alaska.

for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale or other disposition under any of the public lands laws applicable to Alaska. (J. A. 62; emphasis supplied.)

All of the lands sought by respondents were within the Range established by this order, but those of respondent Coyle were in the excepted area. The Coyle lands were taken out of the excepted area in 1948 by Public Land Order 487, next described.

The order of June 16, 1948: Public Land Order 487 of June 16, 1948 (13 F. R. 3462; Pet. App. 10a) withdrew some but not all of the lands within the Kenai National Moose Range which the 1941 order left open for use and disposition under the public land laws,⁵ as well as other lands outside the Range.

The general suspension order of August 31, 1953. In 1953 the Department of the Interior undertook a general study of those wildlife refuges, or portions of wildlife refuges which were "otherwise available for leasing" to determine whether such leasing was consistent with the protection of wildlife therein. Pending completion of the study, the Department on August 31, 1953 issued a general order suspending "action on all pending oil and gas lease offers and applications for lands within such refuges." (See J. A. 35.)

As of the date of this order, the Range lands were thus in three categories: (1) a large portion withdrawn from any disposition under the public land laws applicable to Alaska by the terms of the 1941 Executive Order; (2) part

⁵ As noted, the lands of respondent Coyle in the excepted area of the Range were affected by this order. The court of appeals in the light of all the circumstances of the case subsequently discussed found no material difference to exist between the Coyle claim and the claim of the other respondents (Pet. App. 27a-28a).

of the excepted area of the Range, originally left available to disposition and use under the public land laws but withdrawn by the 1948 public land order; and (3) that portion of the excepted area not withdrawn by the 1948 public land order, but suspended by the 1953 order from any action on "pending oil and gas lease offers." This was the status of the lands when the oil company representatives to whom the Anchorage Land Office subsequently granted leases in the present case conflicting with respondents' applications filed their oil and gas lease offers between October 16, 1954 and January 28, 1955.*

The order of September 9, 1955 and its amendment. Public Land Order 1212 issued September 9, 1955 (20 F. R. 6795), revoked in its entirety Public Land Order No. 487 of June 16, 1948. As noted by the court of appeals, (Pet. App. 21a), the order provided initially that a small piece of land (not involved in the present suit) was:

2. Subject to valid existing rights * * * withdrawn from all forms of appropriation under the public-land laws, including the mining, *but not the mineral-leasing laws*, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. * * * (Emphasis supplied.)

The order then proceeded to deal with the remainder of the land restored. After granting preference for homesteading, it provided:

6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, *including the mineral-leasing laws*. * * *

* Nine of the conflicting offers were in category (1), and one, contrary to the Coyle offer, was in category (2). The existence of the third, or "suspension" category is relevant to interpreting subsequent orders regarding the Range.

7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, *including leasing under the mineral-leasing laws.* . . . (Emphasis supplied.)

On October 4, 1955, Public Land Order No. 1212 was amended to delete the provisions for leasing under the mineral-leasing laws appearing in paragraphs 6 and 7 of the order (20 F. R. 7904).

The amended regulations of December 8, 1955. On this date the Department amended its general regulations pertaining to those wildlife areas available for oil and gas leasing, (43 C. F. R. 192.9 (Circular 1945); 20 F. R. 9009; Pet. App. 11a).⁷ The regulation however expressly designated certain areas of the Kenai Moose Range (not involved in this case) as available for leasing only upon approval of a detailed operating program to protect the wildlife. After an operating program had been approved by the Fish and Wildlife Service pursuant to this regulation, oil and gas leases were issued in 1956 for the area within the Range known as the Swanson River Unit. (Tr. 182; Resp. App. B hereto.)

Reimposition of general suspension of leasing in 1956. The Director of the Bureau of Land Management in a general order in 1956 affecting all wildlife refuges or portions of such refuges "remaining open to leasing" (J. A. 36), again suspended all "disposition by lease or otherwise or the granting of any use of such lands."⁸

⁷ These regulations in no way stated, as did the regulations of January 8, 1958, *infra*, pp. 8-9, that they were to apply to all refuges, even to those which by the terms of their withdrawal order were closed to oil and gas leasing.

⁸ The record is not clear as to when the August 31, 1953 suspension order was terminated, or as to exactly when the 1956 suspension order was first imposed. The 1956 suspension apparently continued up until the 1958 orders.

Leases issued prior to 1958. The petitioner lists at pages 10-11 the numbers of leases issued within the Moose Range for various years prior to 1958. However, the petitioner neglects to advise the Court as to the particular status of the lands upon which those leases were issued. A map submitted by the oil companies with their unsuccessful motion for leave to file as amici curiae in the court of appeals shows that all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order, or were in the Swanson River Unit specifically authorized by the regulations of December 8, 1955 (Tr. 146; map reproduced as Resp. App. A hereto).⁹ Other than in these two special areas of the Moose Range, no oil and gas leases were issued for the bulk of lands within the Range, including the lands in dispute here, from the time the Range was created in 1941 until the Land Office action in 1958 here contested.

The general regulations of January 10, 1958 and the Kenai Range order of August 2, 1958. The specific order by which the Range lands involved in this case first became available for leasing was Secretary of Interior Seaton's order of August 2, 1958.¹⁰ This order followed a complete revision of the general regulations issued January 10, 1958 pertaining to all wildlife lands.

⁹ The map shows further that there were offers filed prior to 1958 in the open excepted area of the Range which were not acted upon until after the 1958 order, presumably because suspended by the general suspension orders above noted.

¹⁰ The Secretary conceded below that with respect to this area, no leasing was possible prior to the order of August 2, 1958, but argued that this did not preclude the filing of lease offers prior to the effective date of the January 10, 1958 regulations (J.A. 35, 39). The Secretary further conceded that the Moose Range was closed to oil and gas lease offers between January 10, 1958 and August 14, 1958 (J.A. 37).

The new January 1958 general regulations (43 C. F. R. § 192.9 (1963); Pet. App. 13a) followed a comprehensive examination of *all* wildlife lands owned by the United States, regardless of whether they had been previously closed or open to oil and gas leasing. It was provided that "no offers for oil and gas leases . . . will be accepted" and "no leases . . . will be issued" on any lands defined as "wildlife refuge lands,"

* * * even though such lands * * * by the terms of the *withdrawal order*, may be subject to mineral leasing. (43 C. F. R. § 192.9 (a)(1); 192.9(b)(1); Pet. App. 13a; 14a; (Emphasis supplied).)

This did not affect the Kenai Moose Range, even though the Range was within the definition of "wildlife refuge land," due to another provision of the regulation expressly authorizing future leasing of lands in Alaska wildlife refuges.¹¹ All Alaska wildlife areas are treated the same under the new regulation whether previously open or closed to oil and gas leasing, with such lands to be available for leasing if, and only if, specific agreements could be worked out between the Bureau of Land Management and the Fish and Wildlife Service to protect the wildlife.

Within a few weeks after promulgation of these regulations, the Secretary classified lands in the Kenai National Moose Range for oil and gas leasing, stating in a press release issued January 29, 1958:

I have approved this week classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development . . .

* * * * *

I am assured by Assistant Secretary Leffler that this action *opening a portion of the Kenai range* subject to

¹¹ The 1958 regulations prohibited any leasing or lease offers in all wildlife refuge lands in the continental United States.

the proposed regulated development is entirely consistent with the primary purpose for which the range is managed. (J. A. 16; emphasis supplied.)

This was followed by Secretary Seaton's order of August 2, 1958 (23 F. R. 5883; Pet. App. 17a), which after referring to a consummated agreement necessary to protect wildlife, provided:

Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing: . . . (Emphasis supplied.)

The lands described as "not opened" involved lands in the southern part of the Range and did not embrace any of the lands involved in this case, which are in the northern part of the Range. The northern lands opened by this 1958 order, embraced both the area originally withdrawn by the 1941 order as well as the excepted area, which the 1941 order left open but on which leasing had been suspended at various times prior to 1958. As to these now opened lands, the August 2, 1958 order provided:

• • • Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.

In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined

in accordance with the procedure outlined in the regulation 43 CFR 295.8.¹²

Departmental action in this case. On August 14, 1958 respondents duly filed their respective offers to lease in accordance with the procedure specified in the Secretary's order of August 2, 1958. About a year later; on September 4, 1959, the Land Office held a public drawing pursuant to the provisions of 43 C. F. R. 295.8 (see J. A. 18-24) to determine priorities, as required by the August 2, 1958 order. At the drawing, respondents' lease offers were the first drawn for the lands involved in this case.

Sometime in the fall of 1958, after respondents had filed but without any notice to them, the Anchorage Land Office issued leases for the lands in question to the representatives

¹² 43 C. F. R. 295.8:

Processing of simultaneous applications. All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. . . .

(b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations.

The salutary effect of these regulations to determine a fair and orderly procedure for treating lease offers is described in *Thor-Westcliffe Development, Inc. v. Udall*, 314 F. 2d 257 (D.C. Cir. 1963), *cert denied* 373 U.S. 951.

of the major oil companies, based on the offers filed by them between October 15, 1954 and January 28, 1955. Assigning this leasing action as its reason, and despite respondents' success in the drawing, the Anchorage Land Office in a decision dated October 7, 1959 notified respondents that their lease offers were rejected.

Respondents appealed the decision of the Anchorage Land Office to the Director of the Bureau of Land Management and from there to the Secretary of the Interior, where the deputy solicitor of the Department decided that the prior action of the Land Office should stand. After a petition for rehearing was denied by the same deputy solicitor, the action below was filed in the District Court. On appeal from a judgment for petitioner, the Court of Appeals in a unanimous decision by Judges Bastian, Miller and McGowan, reversed and granted judgment for respondents (Pet. App. 19a-35a).

REASONS FOR DENYING THE WRIT

- I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE MOOSE RANGE LANDS INVOLVED IN THIS CASE AS CLOSED TO OIL AND GAS ACTIVITY UNTIL THE SECRETARY'S ORDER OF AUGUST 2, 1938, THROUGH EXAMINING THE SECRETARY'S PATTERN OF ADMINISTRATION THEREOF AND FROM CONTROLLING LAW.**

The petitioner does not attack the decision of the court of appeals below on the ground that it is in conflict with the decision of another court of appeals, or with applicable decisions of this Court, or that it deprives him of any important general regulatory powers,¹³ but seeks review solely on the narrow ground that the court's construction of the 1941 Executive Order is inconsistent with an asserted administrative construction within the Department. A unanimous court had no difficulty in rejecting this contention.

¹³ The petitioner concedes that he now possesses the power to change the terms of any outstanding Executive or Public Land Order (Pet. 15, n. 24).

A. The administration of the Range is consistent with the holding below.

Petitioner says his interpretation is right and the D. C. Circuit is wrong, because it is his interpretation; and has been given "extensive practical application" (Pet. 10-14). We set forth in our counterstatement of the case the chronological action of the Department regarding the Kenai Range since its creation in 1941 to show that contrary to the petitioner's statement, the variety of orders specifically pertaining to the Range as well as their interrelationship with the various amendments to the general regulations concerning wildlife refuges, must be read consistently with the clear language of the 1941 Executive Order as precluding oil and gas leasing activity on the lands involved in this case.¹⁴ The Departmental actions demonstrate this. Thus, no leases were issued within the Kenai Range between 1941 and 1958 (except on lands in the open excepted and special areas not involved in this case),¹⁵ and none of the orders and regulations pertaining to the Range prior to the express order of August 2, 1958 gave any indication that the bulk of the lands in the Range, including those involved in this case, were open to oil and gas leasing. Only this view is consistent with the basic primary purpose of the Moose Range to protect—

• • • the natural breeding and feeding range of the giant Kenai Moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for study in its natural environment of the practical management of a big game species that has considerable local economic value. • • • (Executive Order No. 8979 of December 16, 1941, 6 F. R. 6471; Pet. App. 9a)

¹⁴ Some of the Department's interim actions regarding this Range may be ambiguous, but to the extent that different meanings are asserted they become hopelessly confused and conflicting.

¹⁵ See *supra*, p. 8 and *infra*, pp. 14-15.

Until the detailed agreements between the Bureau of Land Management and Fish and Wildlife Service had been worked out and published pursuant to the order of August 2, 1958 for the protection of the basic purposes of the Range, oil and gas leasing activity of any sort within the closed area of the Range was not intended.¹⁶ Even then the southern part of the Range was to remain closed. Respondents who thereafter acted in full compliance with the August 2, 1958 order and were selected as the first qualified applicants thereunder in the official drawing, were obviously prejudiced by the attempt to justify the Land Office's issuance of leases to the oil company representatives through the Department retroactively declaring the entire Range open to application prior to 1958. The close study given the detailed facts of this case by the court of appeals amply justified its conclusion that:

*** Deference to agencies does not reach the extent of sanctioning irrational agency action, however, nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the agency's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable. In the case before us the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand. (Pet. App. 28a)

The petitioner relies on the fact that some leases were issued for lands within the Kenai Moose Range prior to 1958 and that this was known to the House Committee on Merchant Marine and Fisheries in 1956 and considered in the Alaska Submerged Lands Act (Pet. 12-13). This is

¹⁶ Certainly the petitioner's concession that the Range lands here involved were closed to lease offers after the January 1958 regulations until the agreement was worked out and published in the August 2, 1958 order (J.A. 37) is difficult to reconcile with his attempt here to uphold speculative offers filed long prior thereto when there was no regulatory machinery for leasing these lands.

a total irrelevancy because of the actual location of these leased lands within the Range, not shown in the petition (discussed *supra*, p. 8), i.e. either in the excepted area of the Range expressly left open by the terms of the 1941 order or in the Swanson River Unit specially authorized by the December 8, 1955 regulation. There was no misunderstanding on the part of respondents, the petitioner, or the court of appeals below that the issue before it did not involve these lands leased before 1958 but only the status of the lands involved in this case, which were never subject to leasing prior to August 2, 1958.¹⁷

B. The Range was closed under the plain meaning of the 1941 order and under the construction of similar language by the courts.

The court of appeals ruled that the 1941 Executive Order creating the Kenai National Moose Range "clearly did remove the land involved from oil and gas leasing" (Pet. App. 25a). This correct result was predicated in large part on the broad language of the order restricting the land against any "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska . . ." In 1941, as well as today, there was no doubt that the Mineral Leasing Act of 1920 as amended was one of the public land laws

¹⁷ Secretary Seaton's 1958 press release announcing the opening of the bulk of the Kenai Moose Range expressly stated:

The lands open to leasing lie primarily north of the Sterling Highway and include the current oil-producing area and two proposed new unit areas. Also included in the open areas will be the Swanson River Valley, * * * (J.A. 16; emphasis supplied; see *supra*, p. 9)

The action of the court below shows that it was under no misapprehension either in unanimously deciding the case (Pet. App. 23a-24a, fn. 8), or in unanimously rejecting motions and briefs filed after the decision by the oil companies urging their participation as amici in a proposed rehearing (Tr. 183).

applicable to Alaska. The Secretary's regulations expressly so provide.¹⁸

The petitioner's attempt to construe the language of the order as limited to instances where the Government parts with title to the land was thoroughly considered by the court below and found inconsistent with other language of the order such as that specifically exempting fish trap sites which are acquired not by deed but by a license, similar in many respects to a lease. In addition, the language pertaining to the excepted area of the Range, which was left open to "*use and disposition . . . pursuant to the public land laws applicable to Alaska*" makes it quite clear when read in *pari materia* with the preceding language in the order that there was to be no such "*use*" of the closed area involved in this case.¹⁹

The petitioner's effort to overcome the clear meaning of the language of the order by reference to some random administrative decisions within the Department was properly rejected below. None of these decisions construed language identical to that of the 1941 Executive Order involved, and even assuming them to be in point, they are completely without value because contrary to prior decisions by this Court and other federal courts.

In *Kinney Coastal Oil Company v. Kieffer*, 277 U.S. 488, 490-491, 504 (1928), this Court ruled that the Mineral Leasing Act of 1920:

* * * relates particularly to the *disposal* of oil, gas and other designated mineral deposits in the lands of the United States, * * * In the main it provides

¹⁸ See 43 CFR § 51—Public Land Laws Applicable to Alaska; 43 CFR § 71.1—Mineral Leasing Laws and Regulations Applicable in Alaska.

¹⁹ This portion of the Executive Order, omitted in Pet. App. 9a-10a, is set out *supra*, p. 4.

that the *disposal* of such deposits shall be through leases * * * (p. 491; emphasis supplied.)²⁰

The Mineral Leasing Act itself in Section 17 provides that "all lands subject to *disposition* under this Act which are known or believed to contain oil and gas deposits . . . may be leased by the Secretary of the Interior" (30 U. S. C. § 226(a).)

Under the Pickett Act of June 25, 1910. (36 Stat. 847; 43 U. S. C. § 141), Congress authorized the President to "withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska . . ." In 1929 the President and Secretary relied on the Pickett Act to close the public lands to oil and gas leasing under the Mineral Leasing Act of 1920. A challenge to the effectiveness of the language used in the Pickett Act to permit a withdrawal of lands from leasing was expressly rejected by the District of Columbia Circuit in *Wilbur v. United States ex rel. Barton*, 46 F. 2d 217, 220-221 (1930), as follows:

* * * But it is insisted that the act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry," and that the application for permit and the lease which may follow discovery of oil under the act of 1920 are not embraced within those terms. *It is apparent, we think, that the act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.*

Under the act of 1920, the applicant for a permit was required to locate and designate the lands sought

²⁰ This decision, although not before the court of appeals below, completely disposes of the petitioner's alleged administrative construction centered on the contention that a lease is not a "disposition."

in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. *This, we think, was akin to location or entry, as used in the act of 1910.* (Emphasis supplied.)

This Court affirmed, 283 U.S. 414, 419 (1931).

In another case decided just five years prior to 1941, this Court again confirmed its interpretation of general language similar to that used in the 1941 order, as withdrawing lands containing oil deposits from rights granted by § 20 of the Mineral Leasing Act of 1920. *Bordieu v. Pacific Western Oil Co.*, 299 U.S. 65 (1936): The lands in question had been withdrawn by the President on December 30, 1910 "from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting use and disposal of petroleum lands." The Court held as follows:

The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under § 20 of the Leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925. . . . The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were "withdrawn from settlement, location, sale or entry and reserved for classification . . ." Whether a "classification" of the lands was affected by the order we need not determine since it is clear that they were "withdrawn" by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privilege of the Act of 1920 that the lands were either withdrawn or classified. * * * (299 U.S. at 69-70.)

Thus, in 1941 when the President issued Executive Order No. 8979 establishing the Kenai National Moose Range as a wildlife refuge, the words he employed had become well established under the existing decisions of the courts interpreting similar withdrawal orders; in every case it had

been held that the language withdrew and closed the lands to activity under the mineral leasing laws. Despite the petitioner's straining, this law and the plain meaning of the language used creating the Range uphold the ruling below that the Range lands were closed until opened to offers to lease by the express order of the Secretary of August 2, 1958.²¹

II. THE COURT OF APPEALS DECISION AFFECTS ONLY THE RIGHT TO TEN LEASES WITHIN THE KENAI MOOSE RANGE IN ALASKA.

The Departmental regulations of January 8, 1958 have made it clear that all wildlife refuge lands in the United States except those in Alaska are closed to oil and gas leasing "even though such lands . . . by the terms of the withdrawal order, may be subject to mineral leasing" (43

²¹ Petitioner's attempt (Pet. 8-10) to find an administrative construction of the words used in the 1941 order is fruitless. The Solicitor's 1921 opinion at 48 I.D. 459 (upon which Mr. Hoffman apparently relied) interpreting the words "or other disposal" in a reservation from "entry, location or other disposal" as limited to things akin to "entries" or "locations" was in substance overruled by this Court's decision in 1928 in *Kinney Coastal Oil Company v. Kieffer*, *supra*. In 1948 the Department itself did not follow the 1921 opinion when it rejected lease offers on lands in Alaska withdrawn by Executive Order No. 5214, of October 30, 1929 "from settlement, location, sale or entry." *D. Miller*, 60 I.D. 161 (1948). Subsequently, however, the Department in the *Teuscher* case, 62 I.D. 210 (1955) (decided *after* the conflicting offers in the present case had been filed), reversed the holding of *D. Miller* re the effect of the language of Executive Order No. 5214. But even the *Teuscher* case, which made no mention of this Court's authoritative construction in the *Barton* case, *supra*, of the same words in the 1910 Pickett Act, is not in point. The Executive Order there merely withdrew the lands "from settlement, location, sale or entry." Quite different is the order creating the Kenai Moose Range, which withdrew the land from "settlement, location, sale or entry; or other disposition (except for fish trap sites) . . ." Thus, with such language, leasing could be permitted only on any lands expressly excepted under the order.

C. F. R. 192.9(a)(1), 192.9(b)(1) (1963); Pet. App. 13a, 14a; see also Pet. App. 4a).²² Thus the decision below construing the meaning of the 1941 Executive Order creating the Kenai National Moose Range can have no conceivable relevance to any other wildlife refuges except those in Alaska. With respect to Alaskan wildlife refuges which the 1958 regulations provide may be available for oil and gas leasing, the petitioner concedes that only the Kenai refuge has any present importance for oil and gas (Pet. 5).²³

Within the Kenai National Moose Range, the judgment of the court of appeals directly affects the right to only ten leases sought by the individual respondents for 2,500 acres each. To respondent's knowledge there has been absolutely no drilling or actual production of any oil or gas by the adverse oil company lessees on any of these ten leases.²⁴

Nevertheless, petitioner asserts that the decision below goes beyond the relatively few leases before the court, making "all the leases on the Kenai Range . . . subject to cancellation by the Secretary" (Pet. 5). But petitioner does not say cancellation of all the leases beyond the ten involved is required, nor do the oil companies, nor, indeed,

²² Unless leasing is necessary to prevent draining, 43 C.F.R. 192.9(b)(2).

²³ The decision below could not pose any hardship on the Secretary with regard to any future oil and gas leasing in other Alaskan areas or elsewhere because the Secretary possesses full power to change or revise the terms of any withdrawals of public land. Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831).

²⁴ Some of the 25,000 acres have been included with other lands on which wells have been drilled in a unit agreement.

The complete lack of drilling activity on the lands involved in this suit while proceeding on adjacent lands, is a curious coincidence in the light of the oil companies' assertion that they had no knowledge of this suit (Amici brief, p. 12).

did the court below. There are several reasons why this result does not follow.

First, the decision below rests on a determination as to which of two conflicting applicants for the respective leases should prevail, pursuant to the mandate of Section 17 of the Mineral Leasing Act (30 U.S.C. § 226) requiring the issuance of a lease to the first qualified applicant. There is absolutely no showing that for any of the leases other than those involved in this case, there were any conflicting lease applications pending, so as to require a determination as to which application under the circumstances was first qualified. Certainly the court of appeals has made no determination of the completely different case that would be presented where there was just one offer pending to lease particular lands. In such a case any infirmity in the lease offer might well be considered moot or unimportant to the validity of the lease.

Second, even if it were shown that there were conflicting applications for each of the 433 leases, this does not necessarily mean that those outstanding leases are subject to cancellation in the absence of a timely appeal by the rejected applicant. The Mineral Leasing Act expressly provides:

No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter. * * * (30 U. S. C. § 226-2.)

Except for the case sought to be reviewed here, we are aware of no actions by any persons who may have filed conflicting offers prior to the issuance of the 433 leases, which seek to challenge the issuance of those leases.

Third, in the absence of any appeals by adverse lease applicants, the question whether the Secretary may *sua sponte* cancel outstanding leases would present an entirely

different case. The issue there would be whether leases issued under an erroneous construction of law, not contested by counter-applicants for leases, are subject to retroactive invalidation. That this different situation may well not require cancellation is now well established. *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962); *cert. denied* 371 U.S. 901.

The petitioner further argues that the case should be reviewed by this court to prevent a multiplicity of litigation (Pet. 6), presumably to be brought by the oil companies. As respondents point out in discussing the so-called "indispensable party" issue,²⁵ the oil companies, whose representatives were parties to the administrative proceedings, knew or should have known of respondents' action for judicial review against the Secretary, but declined to seek intervention therein.²⁶ While thus having assumed the role of a nonparty to the litigation, the oil companies nevertheless sought to litigate their case by detailed briefs on the merits urging rehearing in the court of appeals, and now urge certiorari here, all under the garb of "amici curiae." Even if after this history the oil companies should refuse to abide by the decision below²⁷, a threat of further litigation provides no valid reason for now reviewing the judgment below. Certainly the speculation that some case may be brought in some court at some future time resulting in some ruling conflicting with that of the court of appeals

²⁵ *Infra*, p. 25.

²⁶ The right of a lessee to intervene in a suit for judicial review against the Secretary by an adverse claimant for the lease is well established. See *Safarik v. Udall*, 304 F. 2d 944, 948 (D.C. Cir. 1962), *cert. denied* 371 U.S. 901; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 218 (1938).

²⁷ In no other instance that we can find has the disappointed lessee, even though not a party to the review proceedings, refused to abide by a judgment against the Secretary rendered by the District of Columbia Circuit.

below, provides no occasion for this Court to now exercise its certiorari powers. Should such a future conflict actually arise, then this Court could be presented with a cognizable basis for its certiorari jurisdiction, under its Rule 19.

III. THERE IS NO INDISPENSABLE PARTY ISSUE WARRANTING REVIEW BY THIS COURT.

Petitioner's concession that he did not raise the so-called indispensable party issue in the court of appeals below, nor does he desire to have this Court pass on the question (Pet. 17-18), should bar its consideration now. *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958); *California v. Taylor*, 353 U.S. 553, 557, n. 2 (1957).

Even if properly before the Court, the contention poses no issue warranting review.

A. The oil companies are not indispensable parties.

It is now well established that lessees are not indispensable parties to a suit against the Secretary for judicial review of Departmental errors in issuing such leases under Section 17 of the Mineral Leasing Act. The District of Columbia Circuit in a unanimous decision by Judges Bazelon, Edgerton and Fahy, squarely so held in *Barash v. Seaton*, 256 F. 2d 714, 718 (1958), from which the Secretary sought no review by this Court.²⁸ The *Barash* decision cited this Court's decision in *Work v. Louisiana*, 269 U.S. 250, 254-255 (1925), which distinguished the old cases cited by petitioner and amici. And in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300 (1902) this Court held that proposed lessees of oil lands need not be joined in a suit against

²⁸ For a similar result see *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955) where the court ordered a lease issued by the Secretary in violation of his own regulations to be set aside regardless of the absence of the lessee (Culbertson) as a party to the judicial review proceedings.

the Secretary to restrain him from leasing oil lands held for the benefit of Indians.

The *Barash* case is alone consistent with this Court's decision last term in *Boesche v. Udall*, 373 U.S. 472 (1963), ruling that the Secretary of the Interior is possessed of administrative authority to cancel oil and gas leases on public lands for invalidity at their inception:

• • • We hold • • • that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land. (373 U.S. at 485)²⁹

The petitioner's further suggestion that the present review proceedings must be dismissed for lack of the oil company lessees because the oil companies may seek to challenge the D. C. Circuit's holding by a new review action in the Ninth Circuit "(in a proceeding in which the respondents similarly were not made parties)" (Pet. 19), is patently fallacious.³⁰ What the petitioner is in effect saying is that his erroneous decision in this case is not subject to judicial review. In any event even if it be assumed that the oil companies may collaterally attack the judgment of the D. C. Circuit below (*cf. City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1957)), petitioner's

²⁹ In *Boesche* only one of the "competing applicants for the same land" was before the courts. Cuccia and Conley, the adverse applicants to whom the Secretary had deferred the issuance of a lease and the cancellation of *Boesche's* lease, were not parties to the judicial review proceedings.

Under the Departmental practice notice to the lessee is not a condition precedent to administrative cancellation, although the lessee may appeal to the Secretary. *Seaton v. The Texas Co.*, 256 F. 2d 718, 721 (D.C. Cir. 1958).

³⁰ If the oil companies are free to bring such a new action, then *a fortiori* they are not indispensable parties to the present action.

speculation as to the nature and outcome of a hypothetical future suit by the oil companies obviously provides no basis for this Court to exercise its certiorari powers at this time. To the contrary, only when and if there are conflicting Circuit Court decisions would review be appropriate.

While the law is clear that the oil companies are not indispensable parties, the precise position of the oil companies seeking to file as amici vis-a-vis the present litigation should be noted.

B. The oil companies voluntarily declined to intervene as parties to the judicial proceedings below.

Each of the persons having an adverse interest in the leases involved in the present case was advised by certified mail as "adverse parties", pursuant to Departmental procedures, of all of the administrative proceedings within the Department by respondents challenging the issuance of leases in disregard of their pending lease offers.³¹ In particular, respondents' petition to the Secretary (J. A. 41-60) challenging the issuance of the leases on similar grounds to those subsequently adopted by the court of appeals, was mailed to each of these persons and proof of service was made to the Department (Tr. 177-180). The oil companies knew of the Department's decision of April 25, 1962 denying this petition. (Tr. 181.) The present suit for review was filed 44 days later on June 8, 1962 in the only court in the United States then having jurisdiction of such an action against the Secretary of Interior, namely the United States District Court for the District of Columbia,³² within the 90 day period specified by Congress for the initiation

³¹ The oil companies admitted in the court of appeals that they had notice of the administrative proceedings.

³² 62 Stat. 935 (1948), 28 U.S.C. § 139 (1958); *Thomas v. Union Pac. R.*, 139 F. Supp. 588, 596-97 (D. Colo. 1936), *aff'd per curiam* 239 F. 2d 641 (10th Cir. 1956).

of such suits.³³ Jurisdiction over the oil company representatives in that court was not possible. The oil companies could have petitioned to intervene in the proceedings in the District Court as parties,³⁴ but did not.³⁵ When abstaining nevertheless brought an adverse result in the D. C. Circuit the oil companies sought to be heard as amici in urging rehearing. Similarly they seek to litigate the merits of the case now in this Court, urging that no review of the Secretary's erroneous action is possible because they are indispensable parties. Under these circumstances, respondents submit that this Court, as did the court of appeals below (Tr. 183), should dismiss the motion of the oil companies to file an amici curiae brief in this proceeding.

³³ 30 U.S.C. § 226-2. Public Law 97-478, 76 Stat. 744 (1962), 28 U.S.C. §§ 1361, 1391(3) (Supp. 1962) permitting suits against the Secretary in other jurisdictions was not enacted until October 5, 1962.

³⁴ See *Safarik v. Udall*, 304 F. 2d 944, 948 (D.C. Cir. 1962), cert. denied 371 U.S. 901; cf. *Consolidated Edison Co. v. NLRB*, 350 U.S. 197; 218 (1938).

³⁵ The oil companies' claim that they had no knowledge of the judicial proceedings (Amici Motion, p. 12) when there was only one court where such could be brought strains credulity, in view of their expressed interest in these lands. But the point is immaterial, for they in any event could have known of the judicial proceedings which were a matter of open, available public record. Likewise there was presumably a choice. By not participating the issue might be cast simply as the Tallman group versus the Secretary. By participating the case could fall in the less favorable category of the Tallman group versus the oil companies:

• • • Moreover, the Secretary's latitude is not the same in all circumstances. When the controversy is fundamentally between two private interests, . . . his discretion is not as great as when the controversy is between private interests on one hand and the Secretary "as guardian of the people", on the other, . . . The law is not blind to such distinctions. (*Seaton v. The Texas Company*, 256 F. 2d 718, 722 (D.C. Cir. 1958).

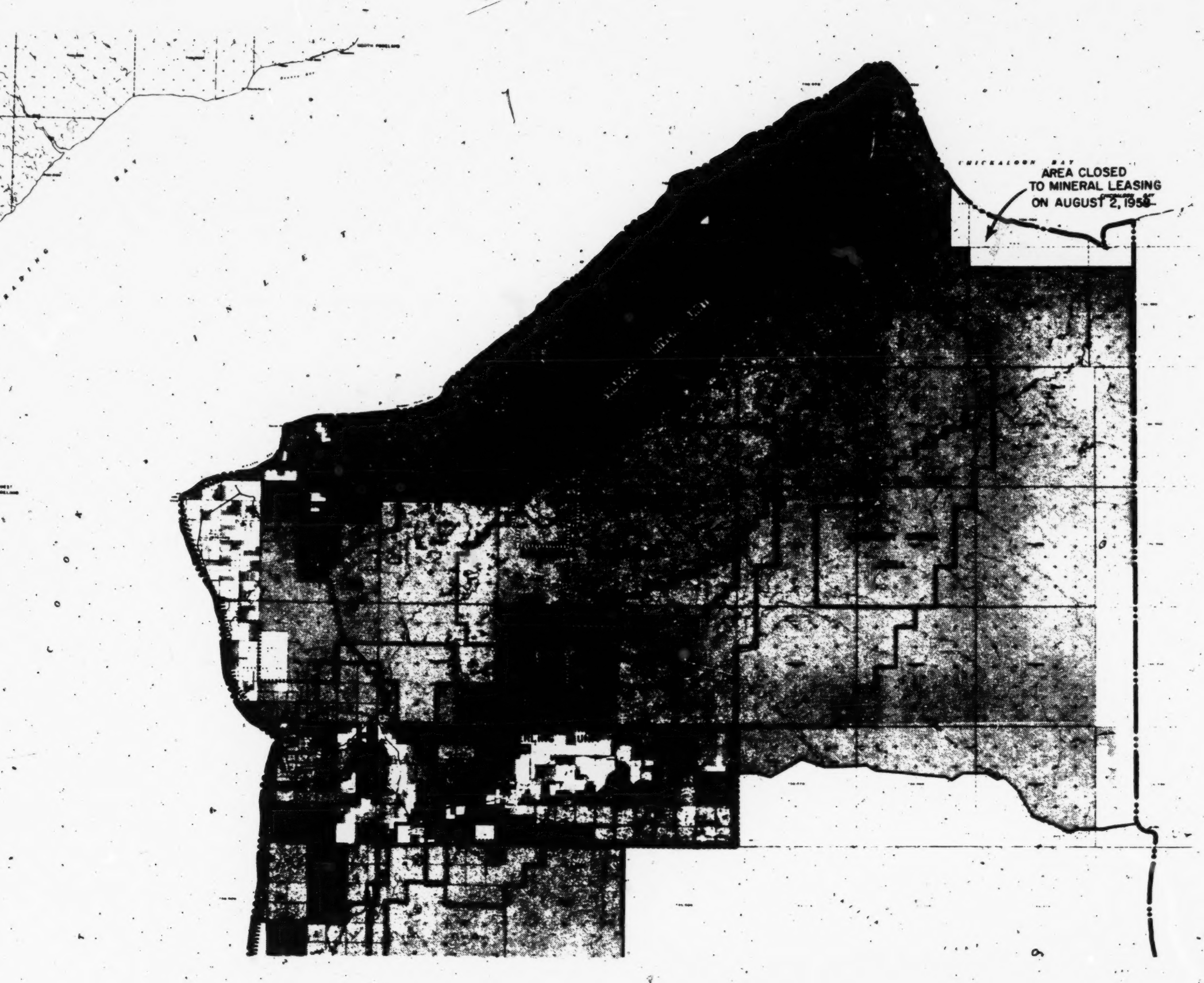
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, as should the motion for leave to file a brief amicus in support thereof.

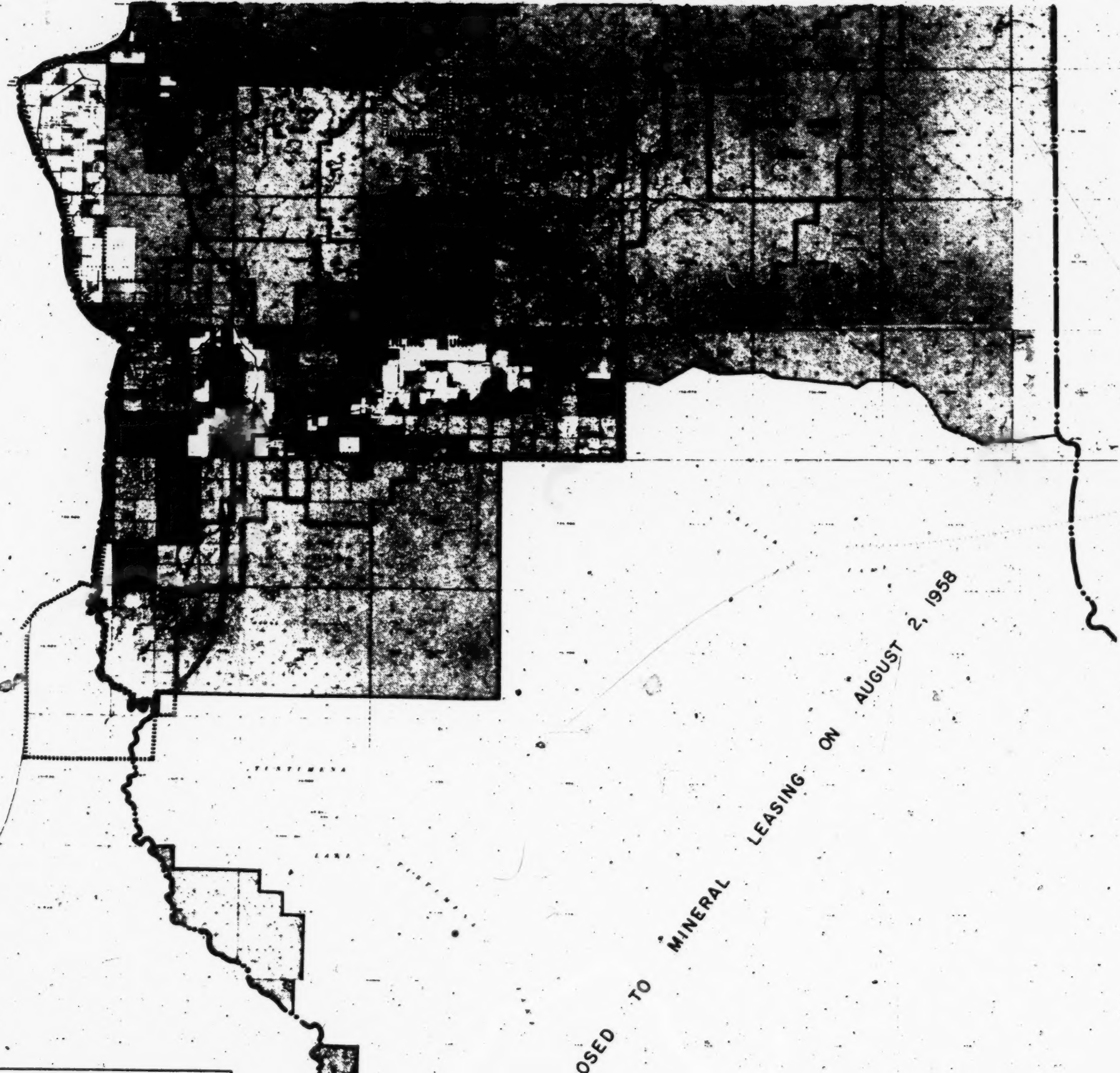
Respectfully submitted,

CHARLES F. WHEATLEY, JR.
ROBERT L. MCCARTY
MCCARTY AND WHEATLEY
1201 Walker Building
Washington, D. C., 20005
Counsel for Respondents

March 11, 1964



UNIKALOOK BAY
AREA CLOSED
TO MINERAL LEASING
ON AUGUST 2, 1958



CLOSED TO MINERAL LEASING ON AUGUST 2, 1958

LEGEND

----- KIMMEL MOORE RANGE, EXECUTIVE ORDER NO. 8979
DECEMBER 16, 1941

----- RECEIVED FROM EXECUTIVE ORDER NO. 8979

----- WITHHELD BY PUBLIC LAND ORDER 437
RECEIVED BY PUBLIC LAND ORDER 1212
BUREAU GEOLOGICAL SURVEY (U.S.G.S.)

----- LAND LEASED PURSUANT TO OFFERS MADE PRIOR TO
AUGUST 14, 1958 AND ISSUED AFTER SEPTEMBER 1, 1958
APPROX. 784,000 ACRES

----- LAND SUBJECT TO TALLMAN GROUP OFFERS

----- LEASES ISSUED PRIOR TO AUGUST 2, 1958
APPROX. 129,000 ACRES

* PRODUCING GAS WELL

o WELL LOCATION SURVEY UNIT

0 5 10
SCALE IN MILES

AREA CLOSED TO MINERAL LEASING ON AUGUST 2, 1958

RESPONDENTS' EXHIBIT B

Aug 7 - 1956

MEMORANDUM

To: Director, Bureau of Land Management

From: Director, Fish and Wildlife Service

**Subject: Kenai National Moose Range—Operating
Program—Richfield Oil Corporation**

In accordance with the provisions of 43 CFR 192.9 (Circular 1945) an operating program has been approved by this Service, copy attached, for operations in the Swanson River Unit Area, Territory of Alaska, under Contract No. 14-08-001-2969 that was approved by the Geological Survey on July 31, 1956.

Oil and gas leases may be issued for the lands of the Kenai National Moose Range that are included within the said unit area, provided the lessees comply with the requirements of the operating program.

(SGD) JOHN L. FARLEY

Attachment

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 813

**STEWART L. UDALL, SECRETARY OF THE INTERIOR,
PETITIONER**

v.

JAMES K. TALLMAN, ET AL.

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

REPLY BRIEF FOR THE PETITIONER

We showed in the petition that not only were lease offers covering substantially the whole of the Kenai Moose Range accepted for filing prior to 1958—i.e., during the period the court of appeals held the Range was “closed” to leasing—but leases covering over 133,000 acres were actually issued during that period (Pet. 10–11). Respondents dismiss that showing—and the Congressional approval of those actions (Pet. 12–14)—with the assertion, often repeated but never explained, that “all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941

Executive Order, or were in the Swanson River Unit specifically authorized by the regulations of December 8, 1955" (Opp. 8; see also 7, 13, 15). The errors of that assertion make necessary this reply brief.

I

The Swanson River Unit to which respondents refer comprises 30 leases, covering 71,680 acres, issued in 1956¹ with the advance approval of the House Committee on Merchant Marine and Fisheries (see Pet. 13). Respondents acknowledge that those leases were within the area which they claim was closed to leasing by the 1941 Executive Order (i.e., were not within the "excepted area") but seek to explain away the leasing on the ground that it was "specifically authorized by the regulations of December 8, 1955" (Opp. 8, 15). The only hint respondents give of the basis for that assertion is their statement that the 1955 regulation "expressly designated certain areas of the Kenai Moose Range (not involved in this case) as available for leasing only upon approval of a detailed operating program to protect the wildlife" (Opp. 7). That statement is true enough. Contrary to the inferences respondents seemingly invite the reader to draw, however, (a) the areas thus "expressly designated" did not include the Swanson River Unit; and (b) the regulation *restricted* rather than *authorized* leasing in the areas so "designated."

¹ Two of the leases, covering 4,160 acres, did not become effective until January 1, 1957.

a. The only areas of the Kenai Range "expressly designated" in the 1955 regulation were (Pet. 13a):

Kenai: The following areas and all lands within one mile of Tustumena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

The leases comprising the Swanson River Unit cover an area approximately 25 miles long and 5 miles wide. At the *closest* point, the boundary of those leases is 27.8 miles from Tustumena Lake, 17 miles from Skilak Lake, 12 miles from Kenai River, 36.4 miles from Upper Russian Lake, 33.8 miles from Lower Russian Lake, 19.8 miles from River Hidden Lake, 24.5 miles from Kasilof River, and 4.5 miles from Chickaloon Flats. There is not the slightest relationship, geographic or otherwise, between the Swanson River Unit leases and the areas "expressly designated" in the 1955 regulation.

b. The legal premise of respondents' argument—that the 1955 regulation "specifically authorized" leasing in the "expressly designated" areas in order to except them from a general prohibition against leasing—is as false as the factual premise. The 1955 regulation is set out in full at Pet. 11a-13a. After forbidding leasing in certain wildlife areas not material here, the regulation provided (§ 192.9(b)(1)):

Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that * * * [in areas in which leasing] might seriously impair or destroy the usefulness of the lands for wild-

life conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. * * *

The areas in which it had been determined that leasing "might seriously impair or destroy" wildlife uses were listed in an Appendix B, and it is there that the areas of the Kenai Range mentioned above (Tustumena Lake, *etc.*) were "expressly designated." By the very terms of the regulation, therefore, those areas were designated, not to authorize leasing in them, but to "except" them from the category of lands in which "leases may be issued" without limitation and to subject their leasing to special restrictions.

Far from "specifically authorizing" leasing in the "designated" areas despite the alleged "closing" of the Range by the 1941 Executive Order, what the 1955 regulation did was to make express the Department's view that the Range had never been closed. The provision that "leases may be issued for other lands administered by the Fish and Wildlife Service for conservation purposes" literally included the Kenai Moose Range, and the specific exception of a part of the Range from that provision confirmed that meaning by necessary implication. In thus treating the entire Range as an area in which "leases may be issued" subject only to the designated restrictions, the regulation was necessarily premised upon a construction of

the 1941 Order as not barring mineral leasing.² It was on that premise, not by virtue of some "special" authority (Opp. 15), that the Swanson River Unit was leased.

II

Respondents state that, with the exception of the Swanson River Unit, "all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order" (Opp. 8, 13, 15).. With some exceptions which respondents perhaps understandably overlooked,³ the statement is literally true. In this instance, the error is that of omission. The omitted but crucial fact is that most of the area originally excepted from the 1941 Executive Order was later "withdrawn from settlement, location, sale or entry" by a Public Land Order issued in 1948 (Order No. 487, Pet. 10a; see Pet. 8, n. 8). Respondents contend, and the court of appeals held, that the 1948 Order had the same effect in "closing" to leasing the area to which it applied as the 1941 Order had in the area originally withdrawn (see Opp. 5, n. 5). Respondent Coyle's claim, indeed, is wholly dependent

² The 1955 regulation thus also squarely contradicts respondents' assertion that "none of the orders and regulations * * * [prior to 1958] gave any indication that the bulk of the lands in the Range * * * were open to oil and gas leasing" (Opp. 13).

³ Between October 1953 and November 1955, six leases were issued which included 3,306 acres within the area withdrawn by the 1941 Executive Order but not within the Swanson River Unit. Those leases do not, however, appear on the map prepared by the oil companies from which respondents apparently drew their information (Opp. 8).

upon that proposition (see Pet. 8, n. 8). Thus the leases issued prior to 1958 in the area governed by the 1948 Order, on applications filed while that Order was outstanding,⁴ are fully as significant as those issued in the area governed by the 1941 Order: both demonstrate a consistent administrative practice directly opposed to the respondents' view of the effect of such withdrawal orders.⁵

III

Respondents' "explanation" of the leasing practice is not only specious but incomplete, for it treats only with the leases actually issued prior to 1958. To an equally significant part of that practice their only answer is silence: namely, the acceptance for filing and initial processing, prior to 1958, of lease *applications* covering substantially the whole of the northern half of the Range. As explained in the petition (Pet. 11, 2a-6a), final action on most of those applications was

⁴ There were 25 leases covering 42,119 acres in that category. Although Public Land Order No. 487 was revoked on September 9, 1955, by Public Land Order No. 1212 (see Pet. 10a and footnote), the applications for those 25 leases were all filed (in July 1954 through February 1955), and two of the leases were actually issued (in May and July 1955), prior to the revocation.

⁵ As respondents point out (Opp. 5-6), there was a small portion of the Range (the upper left-hand corner on the map appended to the brief in opposition) that was both excepted from the withdrawal provisions of the 1941 Order and not covered by the 1948 Order. We agree that the leases issued in that area (seven leases covering 15,961 acres) are not material and should not have been included in our statistics. The relevant pre-1958 leases are the 36 leases covering 74,986 acres in the area withdrawn by the 1941 Order and the 25 leases covering 42,119 acres in the area withdrawn by the 1948 Order, making a total of some 117,000 acres, rather than the figure of 133,000 given in the petition (Pet. 10-11).

withheld pending a reexamination of the wildlife-refuge leasing policy and a revision of the regulation accordingly. When, with the adoption of the 1958 version of the regulation and its implementing order of August 2, 1958, the policy questions were finally resolved, those previously-suspended applications were promptly acted upon and 366 leases covering an additional 784,000 acres of Range land were issued.* Although its validity is the very issue in this case, that action—expressly contemplated by the 1958 regulation and order (Pet. 5a-6a)—is itself incontestable proof of the extensive practical implementation of the Secretary's interpretation of the withdrawal orders as not barring mineral leasing. The action of the Department in leasing substantially the whole of the Range left open by the 1958 order on the basis of pre-1958 applications does not lose its legal significance by being ignored by respondents.

IV

Despite the fact that substantially *all* of the leases issued in the Range (covering over 900,000 acres) were issued on applications filed prior to 1958, respondents assert that the court of appeals' holding that a lease so issued is a "nullity" does not present an important question. The only reason given is that,

* Those figures include a small area of the Range that is technically irrelevant. See note 5, *supra*, and the map appended to the brief in opposition.

since none of the other top-filers⁷ appear to have preserved their rights—which is in itself, we suggest, some indication of the insubstantiality of the claim—there is a “question” whether the validity of the other leases could be attacked, either by private persons or by the Secretary *sua sponte* (Opp. 21-22).

Whether any private persons could find a way to challenge the other leases can only be a matter of speculation; not even respondents claim that the “questions” that might be raised have been finally settled. The only authority cited by respondents is the statute requiring suits challenging leasing actions to be brought within 90 days of the final decision of the Secretary (30 U.S.C. 226-2; Opp. 21). The decision below, however, shows what small comfort that provision gives lessees: after more than 90 days had already elapsed from an otherwise final decision by the Secretary, the respondents successfully managed to reinstate their right to bring suit simply by filing with the Secretary an extraordinary “Petition for Exercise of Supervisory Authority” (J.A. 41; Pet. 28a-31a). Nor does that provision prevent anyone from filing a new application and then seeking a time-

⁷ Initially, respondents pretend to ignorance whether there were conflicting applications on file when the other leases were issued (Opp. 21). In the drawing held among the applications “simultaneously” filed in August 1958 (see Pet. 6a and notes), the respondents’ applications ranged between the 6th and the 179th drawn, yet were the first to cover the land in suit, demonstrating that the other applications (listed at J.A. 19-24) were on many other parts of the Range. The subsequent leasing of substantially the whole of the Range on offers filed prior to 1958 was therefore necessarily in the face of conflicting offers filed at the same time as respondents’.

ly review of its rejection. While it is our view that an applicant for already-leased lands may not challenge the validity of the existing leases, our certainty of that is no greater than was our certainty that respondents could not prevail in this action—particularly if such a case arose in the court below and were seen by it as an effort to force an intransigent Secretary to “comply” with its decision in this case. And due recognition for the ingenuity of counsel dictates caution in assuming that no other forms of attack by private persons could be found.*

Whatever the possibilities for private actions, we share none of respondents’ doubts about the power of the Secretary *sua sponte* to cancel invalidly-issued leases. And if the decision below holding such leases to be invalid were allowed to become final, the Secretary would be hard-pressed to justify—against the predictable charges of making a “give-away” to the “oil companies”—setting his view of the law against the courts’ and refusing to take any action to set aside leases on valuable oil lands which, according to a solemn judgment of the court of appeals

* What of an action, for example, by a homestead patentee of lands subject to such “invalid” leases?

* A kind of emotional appeal not unlike that made by respondents in their repeated reference to the Griffin applicants as “representatives of the oil companies” (Opp. 2, 3, 6, 11-12, 14). In fact, of course, the Griffin group had no relationship to the oil companies when they filed their applications but thereafter did just what respondents would have done had they gotten the leases—namely, sell the leases or working interests to a company with sufficient resources to develop them, retaining an overriding royalty. And since the original applicants still have a royalty interest, the oil companies are not even now the only parties in interest.

which this Court declined to review, were mere "nullities."

The short of it, however, is that it is simply no answer to our claim of importance to say that, in litigation involving the other leases, the lessees "may" be able to raise other "questions" and might ultimately prevail. The urgent need for review by this Court arises, not merely from the ultimate impact of the rule announced by the decision below, but from the immediate impact of the doubt created by it in disrupting the orderly development of the oil and gas resources of the Kenai Range and in threatening to precipitate extensive and, in our view, wholly needless litigation (see Pet. 6-7). In short, respondents' answer (that the other lessees "may" have additional defenses) gives the existing lessees merely a law suit, not the security of title needed to warrant their expenditure of large sums of money on further development.

CONCLUSION

On nothing more than a disagreement with the Secretary over the abstract meaning of words—words which the Secretary himself had power to change—the court of appeals has declared invalid substantially the entire course of action followed by the Department over many years in the leasing of the Kenai Moose Range. The decision casts in doubt the ownership of leases covering over 900,000 acres of land on which extensive development has taken place and major oil discoveries have been made. The resulting confusion

and uncertainty, which threatens to halt further development in the meantime, can be finally resolved only by this Court. The petition for certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WAYNE G. BARNETT,
STEPHEN J. POLLAK,
Assistants to the Solicitor General.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys.

MARCH 1964.

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 14 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, Secretary of the Interior,
Petitioner

v.
JAMES K. TALLMAN, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS
AS AMICI CURIAE BY HIGHFIELD OIL CORPORATION,
STANDARD OIL COMPANY OF CALIFORNIA,
MARATHON OIL COMPANY AND UNION OIL
COMPANY OF CALIFORNIA

CHARLES F. WHEATLEY, JR.
ROBERT L. MCCARTY
MCCARTY AND WHEATLEY
1201 Walker Building
Washington, D. C., 20005
Counsel for Respondents

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, Secretary of the Interior,
Petitioner

v.

JAMES K. TALLMAN, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

**OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS
AS AMICI CURIAE BY RICHFIELD OIL CORPORA-
TION, STANDARD OIL COMPANY OF CALIFORNIA,
MARATHON OIL COMPANY AND UNION OIL
COMPANY OF CALIFORNIA**

Respondents in the above cause object to the granting of the motions of Richfield Oil Corporation, Standard Oil Company of California, Marathon Oil Company, and Union Oil Company of California for leave to file briefs as *amici curiae* for the following reasons.

1. The Movants had notice of the termination of the administrative proceedings in this case. Each of the

persons having an adverse interest in the leases involved in this case were advised by certified mail of the proceedings before the Secretary pursuant to Departmental regulations. In particular, Respondents' Petition for Exercise of Supervisory Authority (R. 46-70) was mailed by certified mail to each of these persons and proof of service was made to the Department. This Petition raised the legal contention subsequently adopted by the Court of Appeals (R. 48-61), which Movants seek to now challenge on the merits as *amici*. Movants had knowledge of the Secretary's decision (R. 71) denying Respondents' Petition before the Department. Despite the fact that Respondents initiated suit against the Secretary within the prescribed 90-day period,¹ in the only court in the country then having jurisdiction of the action,² the present Movants declined to intervene in these judicial proceedings as they had a right to do, apparently for tactical reasons. Having failed to enter the case then or to offer their services as *amici* to the Court of Appeals prior to its decision, the movants now seek to argue this case on the merits while at the same time urging this Court that they were indispensable parties. The Government did not argue this issue below and does not seek to raise this question now and Movants, who consciously kept the issue dormant until this stage, should not be allowed to argue it. The Court of Appeals below unanimously rejected similar motions by these Movants to appear as *amici* in support of rehearing.

¹ 30 U.S.C. § 226-2.

² Public Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1371, 1391(e) (Supp. 1962) permitting suits against the Secretary in other jurisdictions (where *amici* may be situated) was not enacted until October 5, 1962.

2. Movants have not shown how they can be of assistance to this Court in reaching a decision. Their motions set forth no facts of record or questions of law that have not been adequately presented in the brief filed by the Solicitor General, nor do they give any reason for believing that he will not continue to adequately present the Secretary's case. The only issue which the Secretary's brief does not thoroughly present is the indispensable party question, which, as we have stated, should not be raised by the Movants.

For the reasons above stated, respondents respectfully submit that the motions should be denied.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
ROBERT L. McCARTY
McCARTY AND WHEATLEY
1201 Walker Building
Washington, D. C., 20005
Counsel for Respondents

September 14, 1964

NOTION FILED

AUG 2 - 1964

No. 34 LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

October Term, 1964

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
PETITIONER

v.

JAMES K. TALLMAN, et al., RESPONDENTS

**ON CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MOTION OF MARATHON OIL COMPANY AND UNION OIL
COMPANY OF CALIFORNIA FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE AND BRIEF IN SUPPORT
OF PETITIONER**

CLAYTON L. ORN,
Marathon Oil Company Building
Findlay, Ohio.

MARVIN J. SONOSKY,
JOHN S. WHITE,
1225 19th Street, N.W.,
Washington, D.C.

OSCAR L. CHAPMAN,
MARTIN L. FRIEDMAN,
928 Pennsylvania Building,
Washington, D.C.

***Attorneys for Marathon Oil Company**
MARION B. PLANT,
One Eleven Sutter Street,
San Francisco, California
Attorney for Union Oil Company of
California

INDEX

	Page
Motion for Leave to File a Brief as Amici Curiae...	(i)
Brief of Amici Curiae in Support of Petitioner....	1
I. Interest of Amici Curiae.....	1
II. Argument	2
A. Respondents filed their lease applications too late	2
B. The Department followed its long and consistent construction of other similar orders	3
C. The Secretary's construction of the two Orders was rational	5
D. There are language differences in PLO 487 and Order 8979	8
E. The dispute is one of form and not of substance anyhow	13
F. The court below exceeded the permissible scope of judicial review	15
G. The owners of the leases declared to be nullities were indispensable parties	19
Conclusion	20

Appendix

1. Tables showing executive and public land orders containing language identical to or substantially the same as Executive Order 8979 and Public Land Order 487 and reports of Montana and Wyoming land offices on oil and gas leases issued for land withdrawn by such orders.	1A
Table I. Executive and Public Land Orders containing language substantially the same as Executive Order 8979.....	1A
Table II. Executive and Public Land Orders containing language identical to or substantially the same as Public Land Order 487	3A
Table III. Executive and Public Land Orders containing language barring mineral leasing	6A
Table IV. Oil and gas leases issued on lands withdrawn by orders containing lan-	

INDEX

	Page
guage identical to or substantially the same as Executive Order 8979 and Public Land Order 487.....	8A
Memorandum, May 4, 1964, Ed. Pierson, State Director, Wyoming, Bureau of Land Management, to Director, Bureau of Land Management, Washington, D.C.	10A
Memorandum, May 4, 1964, E. W. Rowland, State Director, Montana, Bureau of Land Management, to Director, Bureau of Land Management, Washington, D.C.	11A
2. Correspondence and memoranda of the Department of the Interior and the House Committee on Merchant Marine and Fisheries relating to oil and gas leasing of the Kenai Moose Range.....	13A
Memorandum, August 31, 1953, Director, Bureau of Land Management to Regional Administrators, Managers, Land and Survey Offices	13A
Memorandum, February 15, 1954, Director, Bureau of Land Management, to Assistant Secretary of the Interior Orme Lewis.....	14A
Memorandum, August 12, 1955, Director, Bureau of Land Management, to Area Administrator, Area 4.....	17A
Letter March 21, 1956, Herbert C. Bonner, Chairman, House Committee on Merchant Marine and Fisheries, to Honorable Douglas McKay, Secretary of the Interior.....	19A
Letter March 21, 1956, Douglas McKay to Herbert C. Bonner.....	21A
Letter June 29, 1956, John L. Farley, Director, Fish and Wildlife Service, to Herbert C. Bonner	22A
Letter July 3, 1956, Herbert C. Bonner to John L. Farley	24A
Letter July 25, 1956, Herbert C. Bonner to John L. Farley	25A
Letter May 1, 1958, Ross Leffler, Assistant Secretary of the Interior, to Herbert C. Bonner...	26A
Letter May 2, 1958, Herbert C. Bonner to Ross Leffler	27A

INDEX

Page

CITATIONS

Cases:

<i>Adams v. United States</i> , 318 F.2d 861 (C.A.9, 1963)	17
<i>Best v. Humbolt Placer Mining Co.</i> , 371 U.S. 334	16
<i>Boesche v. Udall</i> , 373 U.S. 472	7, 11
<i>Bourdieu v. Pacific Western Oil Co.</i> , 299 U.S. 65	13, 19
<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410	16
<i>Burnet v. Guggenheim</i> , 288 U.S. 280	19
<i>Cole v. Ralph</i> , 252 U.S. 286	6
<i>Cole v. Young</i> , 351 U.S. 536	19
<i>Dunn v. Ickes</i> , 72 U.S. App. D.C. 325, 115 F.2d 36 (1940), certiorari denied 311 U.S. 698	18
<i>Federal C. C. v. Pottsville Broadcasting Co.</i> , 309 U.S. 134	16
<i>Griffith v. Bogert</i> , 18 How. (59 U.S.) 158	19
<i>Gooch v. United States</i> , 297 U.S. 124	10
<i>Haley v. Seaton</i> , 108 U.S. App. D.C. 257, 281 F.2d 620 (1961)	4, 7
<i>Hooey v. Wilson</i> , 9 Wall. (76 U.S.) 501	19
<i>Ickes v. Development Corp.</i> , 295 U.S. 639	7, 9, 10, 16
<i>Kinney-Costal Oil Co. v. Kieffer</i> , 277 U.S. 488	9
<i>Litchfield v. Richards</i> , 9 Wall. (76 U.S.) 575	(iii)
<i>Mallow v. Hinde</i> , 12 Wheat. (25 U.S.) 193	20
<i>McLaren v. Fleischer</i> , 256 U.S. 477	19
<i>McLennan v. Wilbur</i> , 283 U.S. 414	13
<i>Metlakatla Indian Com. Annette Island Res. v. Egan</i> , 362 P.2d 901 (Alaska, 1961), reversed 369 U.S. 45	12
<i>Mississippi Valley Barge L. Co. v. United States</i> , 292 U.S. 282	16
<i>Norwegian Nitrogen Prod. Co. v. United States</i> , 288 U.S. 294	16
<i>Pan American Petroleum Corporation v. Udall</i> , 192 F.Supp. 626 (D.C. Dist. Col. 1963)	16
<i>Payne v. Newton</i> , 255 U.S. 438	6
<i>Provident Life & Trust Co. v. Mercer County</i> , 170 U.S. 593	19
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134	14
<i>Sorrells v. United States</i> , 287 U.S. 435	19
<i>Unemployment Comp. Comm. v. Aragon</i> , 329 U.S. 143	16
<i>United States v. Alpers</i> , 338 U.S. 680	10
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459	15, 16

INDEX

Page

Cases—Continued

<i>United States v. Ohio Oil Co.</i> , 163 F.2d 633 (C.A. 10, 1947), certiorari denied 333 U.S. 833	17
---	----

Decisions of the Department of the Interior:

<i>Amerman v. Mackenzie</i> , 48 L.D. 580 (1922)	11
<i>Arant v. State of Oregon</i> , 2 L.D. 641 (1883)	10
<i>Earl J. Boehme</i> , 62 I.D. 9 (1955)	4, 7
<i>Martin Judge</i> , 49 L.D. 171 (1921)	6
<i>Noel Teuscher</i> , 62 I.D. 210 (1955)	4
<i>Opinion of the Solicitor</i> , 48 I.D. 459 (1921)	4, 11
<i>Opinion of the Solicitor</i> , 55 I.D. 205 (1935)	4
<i>R. B. Whitaker</i> , 63 I.D. 124 (1956)	6
<i>Richard K. Todd</i> , 68 I.D. 291 (1961)	7
<i>State of Oregon v. Frakes</i> , 33 L.D. 101 (1904)	10

Statutes:

Coal Lands—Source Materials Act of August 11, 1955, c. 795, §§ 1-10, 69 Stat. 679-81; 30 U.S.C., §§ 541-541(i)	10
Defense Department Land Withdrawal Act of February 28, 1958, 72 Stat. 27-30, 43 U.S.C. § 158	10
Homestead Laws, 43 U.S.C. §§ 161-263	6
Isolated Tract Act, 43 U.S.C. § 1171	6
Mineral Leasing Act of February 25, 1920, c. 96, § 1, 41 Stat. 437, 30 U.S.C. § 181	10, 13
Mineral Leasing Act for Acquired Lands of August 7, 1947, c. 513, 61 Stat. 539, 30 U.S.C. § 351	10
Mining Laws, 30 U.S.C. § 29	6
Mining Rights Restoration Act of August 12, 1953, c. 405, 67 Stat. 539, 30 U.S.C. § 501	10
Multiple Mineral Development Act of August 13, 1954, c. 730, 68 Stat. 708-717, 30 U.S.C. §§ 521-531	10
Public and Cash Sale Acts, 43 U.S.C. §§ 671-700	6
Surface Resources Act of July 23, 1955, c. 375, § 5, 74 Stat. 201, 30 U.S.C. § 613	10

Executive and Public Land Orders:

Executive Order 8979, December 16, 1941, 6 F.R. 6471	9, 11
--	-------

INDEX

Page

Executive and Public Land Orders—continued

Executive Order 9146, April 24, 1942, 7 F.R. 3067 . . .	14
Executive Order 9337, April 24, 1943, 8 F.R. 5516 . . .	14
Executive Order 10355 May 26, 1952, 17 F.R. 4831 . .	14
Public Land Order 487, June 16, 1948, 13 F. R. 3462.6, 7, 8, 10	
Public Land Order 751, January 6, 1951, 16 F. R. 9044	5
Public Land Order 778, January 5, 1952, 17. F. R. 159	5
Public Land Order 1212, September 9, 1955, 20 F. R. 6795	7, 8
Amendment to Public Land Order 1212, October 14, 1955, 20 F. R. 7904	7

Regulations and Public Notices:

43 CFR § 71.1 (1954)	10
43 CFR § 192.9, October 29, 1947, 12 F. R. 7334	18
43 CFR § 192.9, December 8, 1955, 20 F. R. 9009	18
43 CFR § 192.9, January 8, 1958, 23 F. R. 227	3, 18
50 CFR § 101.7, -8 102.22-33 (1951)	12
Notice, August 2, 1958, 23 F.R. 5883	14, 15, 18

Congressional References:

H. Rept. No. 1941, 84th Cong., 2d sess., March 22, 1956	2, 3, 14
Hearings before House Committee on Merchant Marine and Fisheries—"Proposal of the Fish and Wildlife Service to Lease Portions of Kenai National Moose Range," July 20, 25, 1956	3, 11

No. 34

In the Supreme Court of the United States

October Term, 1964

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
PETITIONER

v.

JAMES K. TALLMAN, *et al.*, RESPONDENTS

ON CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF MARATHON OIL COMPANY AND UNION OIL
COMPANY OF CALIFORNIA FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE IN SUPPORT OF PETITIONER

Marathon Oil Company and Union Oil Company of California respectfully move the Court for leave to file, as amici curiae, the attached brief in support of petitioner. Consent to the filing of the brief has been given by petitioner but respondents have refused to consent.

Leave is requested on the following grounds:

1. Amici, with leave of the Court, filed a brief in support of the petition for certiorari. They are the real parties in interest, for they are the owners of some of the oil and gas leases which the court below held are nullities. Their leases cover all of the lands in Public Land Order 487 which respondent Waldo E. Coyle seeks to compel the Secretary to lease to him, and a part of the lands in Executive Order 8979 which the other respondents seek to compel the Secretary to lease to them. They also own numerous

other leases on other lands in PLO 487 on which they have drilled several large gas wells, and from which they supply gas to Anchorage, Alaska. They own, too, other leases on other lands in Order 8979 which are in a unit producing large quantities of oil. In developing their leases for oil and gas, they have spent many millions of dollars.

2. The controlling issue in this case is whether the Secretary's construction of Order 8979 and PLO 487 is rational. He construed each Order in his decision under review as not closing the lands in the Order to oil and gas leasing. The leases which he had issued to amici, who were the first qualified applicants, were based upon that same construction. If this Court should hold his construction of the two Orders is not rational, then all of the leases issued to amici and others may be nullities. Obviously, this action involves more than the validity of the leases on the lands which respondents seek to lease.

3. The leases owned by amici include more lands in PLO 487 than in Order 8979, and the large gas field they have developed is on lands in PLO 487. For this reason, their greatest interest lies in PLO 487, which does not contain all of the language found in Order 8979. Much of the opinion of the court below was devoted to the language in Order 8979 not contained in PLO 487. Very little was said by the court about PLO 487. It never even held that the Secretary's construction of PLO 487 was irrational or unreasonable. It simply overturned his construction of PLO 487 because it did not believe that his construction of the language found only in Order 8979 was rational, but without giving any reason for its holding.

4. Amici will be able to present facts and arguments in support of the Secretary's construction of both Orders which the Solicitor General may not present for one reason or another. This was pointed out in the court below by counsel for the Secretary as one of the reasons why amici and other lease owners are indispensable parties. It was there said: "One of the difficulties always presented is that we consider it inappropriate for us, on behalf of the Secretary, to urge facts or equities which may favor such a

lessee." (R. 103.). Amici are the ones who stand to lose if the decision of the Court goes against the Secretary. They are indispensable parties, but not having been joined, they respectfully urge that they be heard before the Court renders a decision in a matter of such importance to them. The Secretary is not the representative of the lessees of the United States, and he cannot speak for them in an action involving the validity of their leases.* Nor was the Department of Justice required to notify amici of the pendency of this action or to raise the question of their indispensability in the district court. Indeed, even the Solicitor General has not deemed it appropriate to continue to urge the indispensable party issue, although he brought it to the Court's attention and briefed it in the petition for certiorari as a "latent jurisdictional question" (Pet, 2, n. 2; 17-20).

For the reasons stated, amici respectfully request leave to file the attached brief in support of the petitioner.

Respectfully submitted,

CLAYTON L. ORN,

Marathon Oil Company Building
Findlay, Ohio.

MARVIN J. SONOSKY,

JOHN S. WHITE,

1225 19th Street, N.W.,
Washington, D.C.

OSCAR L. CHAPMAN,

MARTIN L. FRIEDMAN,

923 Pennsylvania Building,
Washington, D.C.

Attorneys for Marathon Oil Company

MARION B. PLANT,

One Eleven Sutter Street,
San Francisco, California

*Attorney for Union Oil Company of
California*

* *Litchfield v. Richards*, 9 Wall. (76 U.S.) 575, 578, where this Court said: "This is not a case in which the land officers represent these claimants. They have no such duty to perform. They might let the injunction be issued without defense, and thus a proceeding almost *ex parte* be made to strangle the incipient right of the actual settler on the public lands."

No. 34

In the Supreme Court of the United States

October Term, 1964

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
PETITIONER

v.

JAMES K. TALLMAN, *et al.*, RESPONDENTS

ON CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MARATHON OIL COMPANY AND UNION OIL
COMPANY OF CALIFORNIA AS AMICI CURIAE IN
SUPPORT OF PETITIONER

I.

INTEREST OF AMICI CURIAE

Amici are vitally interested in this controversy because they own several of the federal oil and gas leases which respondents contend are void and which the court below held are nullities. They are the real parties in interest and the ones who stand to lose if the decision below is not reversed. In addition, they own interests in numerous other federal leases on lands in the Kenai Moose Range, which,

too, may be nullities under the rationale of the decision below, and upon which they have spent many millions of dollars in exploring for, developing and producing oil and gas.

II.

ARGUMENT

A. Respondents filed their lease applications too late. The Department of the Interior issued the leases to amici because they were the first qualified applicants. No doubt leases would have been issued to respondents had they filed their applications before, instead of four years after, amici filed theirs, for the records of the Department showed all along that the Range was open to leasing. They were filed at a time when substantially all of the Range was then included in leases issued to, or in applications filed by, amici and others.

Amici acquired and developed their leases believing in good faith that the Range was always open to oil and gas leasing.¹ They necessarily relied upon the authority of the Department to determine which federal lands were available for lease. Nothing the Department ever did could have led respondents into believing that the Range was closed to leasing. They simply did not become interested in leas-

¹ Even before some, but after other leases of amici were issued, and before they developed any of them for oil and gas, the House Committee on Merchant Marine and Fisheries, in a report recommending that bills be not enacted which would prohibit the Secretary from disposing of, or relinquishing national wildlife refuges, without prior Congressional approval, said: "Under the law there are, generally speaking, three types of outside interests which may be granted in lands administered through the Fish and Wildlife Service. One type is the grant of sharecropping agreements for the raising of hay and grain * * *. Another applies to the grant of privileges relating to rights-of-way for telephone * * *. The third embraces the grant of privileges (typified by oil and gas leasing) for commercial use which do not have for their purpose the development, management, or use of the lands for wildlife conservation." H. Rept. No. 1941, 84th Cong., 2d Sess., March 22, 1956, "Preservation of National Wildlife Refuges," pursuant to H. Res. 118, pp. 3-4.

ing the lands until after oil and gas was discovered, when they then filed their applications in the hope of gaining a windfall, should they be successful in attacking the validity of the earlier leases or applications.²

B. The Department followed its long and consistent construction of other similar orders. In issuing the leases to amici and others, the Department was following its consistent administrative practice of more than 40 years of leasing lands which had been withdrawn from settlement,

² Respondents filed their lease applications on August 14, 22, 1958, for lands already covered by pending lease applications. Over two years earlier, extensive congressional hearings were held and reports issued on the practice of the Secretary of leasing wildlife refuge lands for oil and gas and noting that the Secretary had issued several leases in 1954 and 1955 on parts of the Range, including 14 leases to The Ohio Oil Company (now Marathon Oil Company) between October 1-November 1, 1955. H. Rept. No. 1941, *supra*, pp. 3-4, 8, and Appendix, p. 18 to report.

Also, before respondents filed their lease applications, the same House Committee on Merchant Marine and Fisheries on July 25, 1956, (1) approved an exploratory and development plan of amicus Standard embracing approximately 72,000 acres of land in Order 8979 and the issuance of leases to amici Standard, Richfield, Ohio (now Marathon) and Union; and (2) approved the issuance of other leases on about 165,000 acres of land in Order 8979 under a development agreement proposed by amicus Standard, on the ground that the leasing and operations would not be detrimental to wildlife. (See letter June 29, 1956, John L. Farley, Director Fish and Wildlife Service, to Herbert C. Bonner, Chairman, House Committee on Merchant Marine and Fisheries; letter July 25, 1956, Herbert C. Bonner to John L. Farley (App. 22A-25A); also *Hearings before House Committee on Merchant Marine and Fisheries*. "Proposal of the Fish and Wildlife Service to Lease Portions of Kenai National Moose Range, Alaska," July 20, 25, 1956, pp. 4-14.) These approvals were made pursuant to an interim arrangement between the Committee and the Secretary of the Interior under which the Secretary was to submit to the Committee certain information regarding oil and gas leases he proposed to issue on national wildlife refuges. H. Rept. No. 1941, *supra*, pp. 11, 12-13; letter March 21, 1956, Herbert C. Bonner, to Douglas McKay, Secretary of the Interior; letter March 21, 1956, Douglas McKay to Herbert C. Bonner (App. 19A-21A). This interim arrangement was later terminated by the Committee on May 2, 1958, after the Secretary promulgated the amendment to his leasing regulation relating to development of wildlife refuge and game range lands for oil and gas (January 8, 1958, 23 F.R. 227, 43 CFR § 192.9). See letter May 1, 1958, Assistant Secretary of the Interior Ross Leffler to Herbert C. Bonner (App. 26A); letter May 2, 1958, Herbert C. Bonner to Ross Leffler (App. 27A).

location, sale, entry or other disposition, where the order did not, as neither Order did here, expressly withdraw the lands from oil and gas leasing. Also, in construing Executive Order 8979 and Public Land Order 487, the Department was following its published opinions construing other similar orders during the past 40 years.³ The words chosen by the Secretary for the two Orders had been used by him in so many other like orders that they then had a well-defined and well-understood meaning. To now give them a different meaning, as the court below did, would defeat the purposes of the Orders.

Many orders withdrawing lands for special purposes have been issued by the Secretary—in fact, over 1,800 were issued during the years 1920-1952. Of these, some 264 contain language substantially the same as that in Order 8979, except for the fish trap site exclusion;⁴ and at least 413 contain language identical to that in PLO 487.⁵ In every instance where the Secretary intended also to close the withdrawn lands to mineral leasing, positive, clear-cut language accomplishing that purpose was written into the order. At least 170 orders contain such language.⁶ Moreover, the Secretary, in leasing lands in these withdrawals, construed the orders in the same way he construed Order 8979 and PLO 487. In a random check of oil and gas leasing in only

³ See, e.g., *Opinion of the Solicitor*, 48 L.D. 459 (1921) ("reserved from entry, location, or other disposal"); *Noel Teuscher*, 62 I.D. 210 (1955) ("withdrawn from settlement, location, sale or entry"); *Opinion of the Solicitor*, 55 I.D. 205, 211 (1935) ("temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification"). The Secretary may, of course, conclude that the purposes of a particular withdrawal would be impaired by leasing and for that reason decline to issue leases in the exercise of his discretion. See e.g., *Earl J. Boehme*, 62 I.D. 9 (1955); *Haley v. Seaton*, 108 U.S. App. D. C. 257, 281 F.2d 620 (1961).

⁴ For a list of these orders, see Table I, App. 1A ("withdrawn from settlement, location, sale, entry or other disposition," or frequently "other appropriation").

⁵ For a list of these orders, see Table II, App. 3A ("withdrawn from settlement, location, sale or entry").

⁶ For a list of these orders, see Table III, App. 6A ("withdrawn from all forms of appropriation, including the mining and mineral leasing laws").

two other states it was found and reported that about 106 leases were issued on lands withdrawn by orders identical to PLO 487 and approximately 260 leases were issued on lands withdrawn by orders substantially the same as Order 8979.⁷ This pattern of leasing is clear proof of the consistent administrative practice and adherence to the rule of construction given the two Orders in issue, and establishes that the leasing program on the Range was no exception to the practice or the rule.

It is significant that, when the Secretary wanted to go ahead and close small tracts in the PLO 487 area to oil and gas leasing, which were then open to leasing, he issued orders withdrawing those tracts "from all forms of appropriation under the public-land laws, including the mining laws and the mineral-leasing laws."⁸ This action was in complete accord with the more than 170 orders containing positive language closing the lands to leasing,⁹ and it points up the conclusion that, in the absence of such positive language, PLO 487 and Order 8979 cannot be construed as closing the Range lands to oil and gas leasing.

C. The Secretary's construction of the two Orders was rational. The Secretary's construction of the two Orders is the only one which will carry out their purposes. His construction is a rational and reasonable one, if it is not the only rational and reasonable one. To construe the two Orders as the court below did necessitates reading into them language they do not contain, and giving the language they do contain a meaning different from its well-accepted meaning, both before and after the Orders were issued.

An examination of PLO 487 shows that it withdrew the

⁷ For examples of leases issued for lands withdrawn for special purposes, see Table IV, App. 8A. This tabulation is based on reports from the Land Offices in Montana and Wyoming (10A-12A). If the court below is correct, all of the leases identified in Table IV are or were nullities.

⁸ Public Land Order 751, September 6, 1951, 16 F.R. 9044; Public Land Order 778, January 5, 1952, 17 F.R. 159.

⁹ See *supra*, p. 4; also Table III, App. 6A.

lands only from "settlement, location, sale or entry."¹⁰ It contains no language similar to that found in the other withdrawal orders which specifically withdrew certain tracts in the Range from oil and gas leasing (*supra*, p. 5). These four words in the Order limiting the scope and extent of the withdrawal were taken from the public-land laws and the mining laws—not from the mineral leasing laws. They are words descriptive of the steps which, if taken under those laws by one desiring to acquire title to public lands which are open, will vest in him an absolute right to a patent without any further action on the part of the Department.¹¹ They were written into PLO 487 for the sole purpose of temporarily closing the lands to settlers, purchasers, locators and entrymen, and thereby relieving the Secretary of what otherwise would have been an absolute obligation to alienate the lands. Retention of title and control of the lands was deemed necessary for the purposes of the withdrawal.

In contrast, however, closing the lands in PLO 487 to oil and gas leasing was unnecessary, because the Secretary had the authority, at his discretion, either to decline to lease

¹⁰ This provision in PLO 487 will be discussed first since the same provision is also contained in Order 8979, and then the additional language in that Order will be examined.

¹¹ "Settlement" and "entry" have special meaning for agricultural and townsite lands. The terms are words of art and frequently appear in the public-land laws. Settlement refers to the physical occupancy of the land for agricultural purposes. Entry connotes both possession of the land as authorized by the administrative procedure and the record notation or entry of the right to go on the land. Neither an oil and gas lease nor its forerunner, the prospecting permit, is considered an entry of public lands. See, e.g., *R. B. Whitaker*, 63 I.D. 124, 127 (1956); *Martin Judge*, 49 L.D. 171, 172 (1922). For separate and distinct uses of the terms "settlement" and "entry" see Homestead Laws, 43 U.S.C. §§ 161-263; also *Payne v. Newton*, 255 U.S. 438. For the public lands available and the conditions of "sale," see e.g., Public and Cash Sale Acts, 43 U.S.C. §§ 671-700; Isolated Tract Act, 43 U.S.C. § 1171. "Location" is the acts adding up to a claim, fulfillment of which leads to a fee patent to the lands and minerals. See Mining Laws, 30 U.S.C. § 29; also *Cole v. Ralph*, 252 U.S. 286, 296. None of the terms have this special meaning with respect to oil and gas leasing.

the lands if the purposes of the withdrawal would be impaired;¹² or to lease the lands, in which event the United States would retain title, and he would retain control over the operations to whatever extent he might find necessary to prevent interference with the purposes of the withdrawal.¹³

The court below gave no reason for its holding that the lands in PLO 487 were closed to leasing. All it said was that these lands "were originally opened by the 1941 order but they were closed in 1948 by Order No. 487." (R. 89.) Obviously it was wrong in saying the lands were "opened" by the 1941 order, meaning Order 8979. That Order opened no lands. On the contrary, it created the Range and withdrew all of the lands in the Range, except an area along the shore of Cook Inlet and the Kenai River, from alienation under the public land laws. The excepted area remained subject to alienation at all times, except as to the part included in PLO 487 which was temporarily withdrawn from most forms of alienation during the period June 16, 1948 to September 9, 1955 while PLO 487 was in force.¹⁴

¹² See e.g., *Earl J. Boehme*, 62 I.D. 9 (1955); *Richard K. Todd*, 68 I.D. 291 (1961); *Haley v. Seaton*, 108 U.S. App. D.C. 257, 281 F.2d 620 (1961).

¹³ See *Boesche v. Udall*, 373 U.S. 472, 477-478; *Ickes v. Development Corp.*, 295 U.S. 639, 645.

¹⁴ PLO 487, having been "revoked in its entirety" by PLO 1212 (September 9, 1955, 20 F.R. 6795), making the lands again available to settlement, location, sale or entry, the Secretary went on in PLO 1212 to establish different periods of priorities in which applications to acquire fee title to the lands could be filed under the public land laws. Under these priorities, war veterans and qualified persons entitled to preferences under certain laws came first, after which the "public generally" could file their applications under "the public-land laws, including the mineral-leasing laws"; with their applications filed during a fixed period to be considered as having been filed simultaneously and their priorities determined at a public drawing. 20 F.R. 6795, ¶¶ 1, 4, 6 and 7. But approximately 30 days later on October 14, 1955, the Secretary amended PLO 1212 by striking all phrases referring to the mineral leasing laws. 20 F.R. 7904. He thus by amending the Order, confined its provisions to applications to acquire fee title under the public land laws. The inclusion in PLO 1212 of phrases referring to the mineral leasing laws was unnecessary, and had they not been stricken wherever they appeared in context with other provisions for filing applications under the public land laws to acquire fee title, the Order might have had the undesired effect of temporarily suspending the filing of oil and gas

PLO 487 did not rescind or cancel the provisions of Order 8979 creating the excepted area, nor did it restore the lands in the excepted area to the full operations of Order 8979, and the court below was wrong in saying the lands were "closed in 1948 by Order No. 487" (R. 89). The lands were only "temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation." (13 F.R. 3462.) The PLO 487 area remained open to oil and gas leasing, as did all of the lands in the Range.

Under the rationale of the decision below, it necessarily follows that there will now be read into the hundreds of orders similar to PLO 487 another clause also withdrawing the lands from numerous statutory uses, unless the order expressly negates such withdrawal. This has never been the rule followed by the courts or the Department; it is illogical and unnecessary; it is an invasion by the court of the functions of the administrative officer charged with the responsibility of managing the public lands, and will be disruptive of thousand of titles and vast investments made during the last half century.

D. There are language differences in PLO 487 and Order 8979. The court below discussed in some detail certain language in Order 8979 not found in PLO 487, but it apparently concluded the differences in language did not require different constructions for it ultimately construed both Orders as closing the lands to leasing. Its construction would defeat the purposes of the two Orders, for the Secretary did not intend to close the lands in either Order

lease applications under the mineral leasing laws until the period fixed in the Order for the public generally to file applications to acquire fee title. Also, the Order, unless amended, would have unnecessarily treated all oil and gas lease applications filed within the fixed period as having been simultaneously filed. The Secretary, to avoid the Order having these undesired effects, issued the amendment promptly, and long before the period fixed in the Order for the public generally to file applications under the public land laws to acquire fee title. The changes made in PLO 1212 are not relevant, and are explained simply because the court below noted them in its opinion, although it did not treat them of importance to its decision (R. 84-85).

to leasing, even though there are language differences.

Following the words "settlement, location, sale, or entry" appearing in both Orders, Order 8979 contains the following clause:

"* * * or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes,' 44 Stat. 821, U.S.C., title 48, secs. 360-361, or to the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon,' 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: * * *."

Manifestly this Order withdrew and reserved "and," for it was the *land*, and not the oil and gas under the land, which was not "subject to * * * other disposition * * * under any of the public-land laws." This restrictive language nowhere prohibits a disposal, under other laws, of any oil and gas under the land, or a leasing of the land for a removal of the oil and gas.

The term "public-land laws," appearing in Order 8979 is commonly used to refer to the numerous statutes governing the alienation of public land, and in construing the Order it must be given the commonly accepted meaning. The term must not be confused with the "mining laws," another and different term often used to identify statutes governing the mining of hard minerals on public lands; or with the "mineral leasing laws" also frequently used to refer to statutes governing the leasing of public lands for oil and gas.¹⁸

¹⁸ See *e.g.*, *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 491, 504, where this Court stated: The Acts of 1914 and 1920 [Mineral Leasing Act] are to be read together—each as the compliment of the other. So read they disclose an intention to divide oil and gas lands into two estates for the purpose of disposal—one including the underlying oil and gas deposits and

Unfortunately, the court below confused these different laws, for it said, " . . . there is no doubt that the Mineral Leasing Act of 1920 is a public-land law applicable to Alaska," citing as authority 43 CFR § 71.1 (1954), a regulation promulgated by the Secretary. But this regulation does not support the court's positive statement. It merely provides that "regulations under the Mineral Leasing Act of February 25, 1920 . . . shall govern the issuance of oil and gas . . . leases, in Alaska." This is admitted, but it is no authority for the court's conclusion that the "public-land laws applicable to Alaska," as used in the context of Order 8979, meant or included the mineral leasing laws.

Moreover, under well-established rules of construction, "other disposition under any of the public-land laws" meant only dispositions analogous to and of the same kind, character and nature as the preceding dispositions,¹⁶ which were all dispositions by alienating the lands.¹⁷ This was

the other the surface—and to make the latter servient to the former." The public land laws are actually under a Title of the United States Code different from the one containing the mining laws and mineral leasing laws. Compare Title 43 U.S.C., Public Lands, and Title 30 U.S.C., Mineral Lands and Mining. For frequent references to the mining laws and mineral leasing laws, see Defense Department Land Withdrawal Act of February 28, 1958, §§ 1-3, 6, 72 Stat. 27-30, 43 U.S.C. §§ 155-158; Mineral Leasing Act for Acquired Lands of August 7, 1947, c. 513, § 1, 61 Stat. 913, 30 U.S.C. § 351; Mining Rights Restoration Act of August 12, 1953, c. 405, §§ 1-5, 67 Stat. 539, 30 U.S.C. §§ 501-505; Multiple Mineral Development Act of August 13, 1954, c. 730, §§ 1-11, 68 Stat. 708-717, 30 U.S.C. §§ 521-531; Coal Lands-Source Materials Mining Act of August 11, 1955, c. 795, §§ 1-10, 69 Stat. 679-681, 30 U.S.C. §§ 541-541(i); Surfaces Resources Act of July 23, 1955, c. 375, § 5, 74 Stat. 201, 30 U.S.C. § 613.

¹⁶ The rule of *ejusdem generis* is a valuable tool for determining the meaning of the more general words. A resort to the rule will neither obscure nor defeat the intent and purpose of the Secretary. *Gooch v. United States*, 297 U.S. 124, 128; *United States v. Alpers*, 338 U.S. 680, 682. See also *Ickes v. Development Corp.*, 295 U.S. 639, 645: "The Leasing Act of 1920 inaugurated a new policy," whereby the Government retained the title and the minerals were subject to lease only.

¹⁷ A "disposal" or "disposition" in public land parlance is equivalent to sale and complete alienation of title—the vestiture of title in the one to whom the disposition is made. *Arant v. State of Oregon*, 2 L.D. 641 (1883); *State of Oregon v. Frakes*, 33 L.D. 101, 103 (1904). An oil and gas lease is

the rule of construction the Department followed in a decision published more than two decades before the Secretary issued Order 8979, where it held that the words "other disposal," when used in a similar context, meant only such disposals as would constitute an alienation of the lands, and not a leasing of lands for oil and gas.¹⁸ It is the same rule of construction which the Department advised the House Committee on Merchant Marine and Fisheries that it had followed since 1921, and had specifically followed in leasing the Range for oil and gas, and is the rule which that Committee tacitly followed when it approved on July 25, 1956, under an interim arrangement with the Secretary, unitization of numerous leases on Range lands and the issuance of other leases on the lands.¹⁹

The court below said in regard to Order 8979 that the " * * specific exemption for fish trap sites in the order strengthens our conviction" that "[T]he prohibition on disposition should be read in an expansive manner * * * [R]ather than the narrow coverage the Secretary now urges." (R. 88-89.) Surely a construction of the Order in a matter of this great importance should not rest upon a parenthetical fish trap exception, when the exception was only included to protect the rights of natives to operate fish traps under permits issued by the Defense Department, in the waters which, together with the surrounding lands, had been withdrawn and reserved as a breeding ground for moose.²⁰ Operation of the traps was not even such a use

neither an entry nor an appropriation and does not vest title to the lands in the lessee. *Opinion of the Solicitor*, 48 L.D. 459, 464 (1921); *Amerman v. Mackenzie*, 48 L.D. 580, 581 (1922). For a discussion of the limited nature of an oil and gas lease, see *Boesche v. Udall*, 373 U.S. 472, 477-478.

¹⁸ *Opinion of the Solicitor*, 48 L.D. 459, 463-464, (1921).

¹⁹ See note 2, *supra*, p. 3; App. 25A; also *Hearings before House Committee on Merchant Marine and Fisheries, Proposal of the Fish and Wildlife Service to Lease Portions of Kenai National Moose Range, Alaska*, July 20, 25, 1956, pp. 25-30, 30-A.

²⁰ The court below likened a fish trap permit to an oil and gas lease (R. 88). Nothing could be farther from correct. The Secretary does not issue fish trap site permits, he merely regulates, for purposes of conserva-

as required a lease of the site from the Secretary of the Interior. He had no proprietary jurisdiction over the navigable waters but only conservation jurisdiction over fishing. Permits were only required from the Defense Department because the traps were obstructions to navigation.

Possibly the fish trap site exception, if needed at all, could have been fitted into the Order in a more appropriate place, but since it was not, it does not follow that because this one use, not proprietary or alienable by deed, was excepted from "other disposition under any of the public-land laws" the Order must now be construed in such an "expansive manner" as will prohibit all permissible statutory proprietary uses of public lands. No court is required to construe an order contrary to the intent of the Secretary, or in a way that will defeat the purposes of the order.

An additional reason why the "other disposition" language cannot be expanded to prohibit all other permissible statutory uses, except fish trap sites, is because the Order goes on to specifically describe two permissible statutory uses which could no longer be made of the lands, viz, leasing the lands for fur farming and leasing the lands for livestock grazing. Under all accepted rules of construction, the inclusion of a prohibition against these two uses precludes reading into the Order, by implication, prohibitions against other permissible statutory uses, such as oil and gas leasing.

The court below attempted to avoid this rule by saying that the "public-land laws applicable to Alaska" as used in Order 8979 meant only "those laws of general applicability throughout the country which were made applicable to Alaska" and that the two laws permitting fur farming and grazing were merely local laws applicable only to Alaska (R. 88). Consequently, the court gave the "other disposition" phrase an "expansive coverage" when it wanted the

tion, the operation of fish traps. For the Secretary's regulations see 50 CFR §§ 101.7-101.8, 102.22-102.33 (1951). For good discussions of practices regarding fish trap sites, see *Metlakatla Indian Com. Annette Island Res. v. Egan*, 362 P. 2d 901, 903-905 (Alaska 1961), reversed 369 U.S. 45.

phrase to include the mineral leasing laws, but a "narrow coverage" when it wanted the phrase to exclude two public land laws authorizing the leasing of Alaska lands for fur farming and livestock grazing.

The court below, in an endeavor to support its theory of "expansive coverage" was wrong when it said the Secretary had urged that oil and gas leasing be excepted along with fish trap sites from the prohibitory provisions of the Order (R. 88). This was not the position of the Secretary. He has never read into the Order, by implication, another exception. It has been his position all along that "other disposition" does not include oil and gas leasing.

Only two cases to support giving the Order "an expansive coverage" are cited in the opinion, but the court recognized that these cases were "not dispositive of the question" (R. 89). In the first case, *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, this Court accepted as valid without discussion a lease issued at a time when the lands in the lease had been withdrawn and reserved by an order quite similar to PLO 487, and went on to decide the case on another point. In the other case, *McLennan v. Wilbur*, 283 U.S. 414, the authority of the Secretary to temporarily stop oil and gas leasing, as an aid in alleviating an over-production of oil in 1929, was sustained without any question being decided involving a construction of the stop order. In neither case did this Court hold that lands withdrawn from settlement, location, sale, or entry were also withdrawn from oil and gas leasing under the Mineral Leasing Act.

E. *The dispute is one of form and not of substance anyhow.* The Secretary's construction of the two Orders as permitting him to execute oil and gas leases, did not result in his gaining, by such construction, a power he did not then have, for he had the power under the Mineral Leasing Act to lease lands which were open²¹ and also since 1942 the au-

²¹ Mineral Leasing Act of February 25, 1920, c. 96, § 1, 41 Stat. 437, as amended, 30 U.S.C. § 181.

thority to close and open public lands to oil and gas leasing.²² In the final analysis, the question is not one involving the power of the Secretary to lease the lands,²³ but one of interpretation of language which he could unilaterally change anyway.

Respondents do not claim that the Department construed Order 8979 and PLO 487 one way at one time and a different way at another time, or that its construction deceived or misled anyone. No one could have been misled because the Department's published decisions, and administrative practice in leasing withdrawn lands, constituted a body of experience and informed judgment, and a policy statement on which the public interested in oil and gas leasing could have relied for guidance.²⁴

Moreover, respondents were not misled, because the Secretary's Kenai Moose Range Notice of August 2, 1958, under which they filed their lease applications and erroneously claim opened the lands in suit to oil and gas leasing, expressly provided that the lease applications then pending on lands in the Range, and upon which processing action had since 1953 been suspended, would thereafter be acted upon and adjudicated in accordance with the regulations (23 F.R. 5883). No language could have more clearly shown that the Secretary had considered all along that the lands were open to leasing than that contained in the notice under which respondents made their filings.

A statement in the court's opinion indicates it did not understand the procedure and practice or purpose of the

²² Executive Order 9146, April 24, 1942, 7 F.R. 3067; Executive Order 9337, April 24, 1943, 8 F.R. 5516; Executive Order No. 10355, May 26, 1952, 17 F.R. 4831.

²³ The House Committee on Merchant Marine and Fisheries concluded not to recommend legislation which would take from the Secretary the power he had to lease wildlife refuge areas. See H. Rept. No. 1941, 84th Cong., 2nd Sess., March 22, 1956, "Preservation of National Wildlife Refuges" pursuant to H. Res. 118, p. 11.

²⁴ See *e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140.

simultaneous filing period under the August 2, 1958 notice and the 1959 public drawing, for it obliquely infers that respondents may not have been treated fairly when the Secretary, instead of issuing leases to respondents (who had prevailed at the drawing) had gone ahead and issued leases to the prior applicants who had filed the first lease offers (R. 86). Of course, no charge of unfairness was made in the complaint, and even had it been made, it would not have been true because the purpose of the simultaneous filing period is to assure fair treatment by drawing by lot the order of priority for processing the simultaneous filings.

The drawing does not assure anyone a lease. It merely establishes a sequence of processing or adjudication among the simultaneously filed applications. If an application is regular and if the land is available, a lease will issue; if irregular, the application is rejected and the next application in the sequence of drawing is processed. If the land is already covered by a lease, the application is rejected, and it was for this reason that respondents' applications were rejected. It is axiomatic that a lease cannot be issued on a subsequent application if the land is covered by a prior application even though there is a public drawing.

The orderly administration of public affairs forbids the courts lightly to invalidate a long-continued course of administrative action, on the basis of which private rights have become vested, and to which all the responsible agencies of the government have adjusted their activities. *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473.

F. *The court below exceeded the permissible scope of judicial review.* Instead of determining whether the construction which the Secretary and the Department have consistently given the two Orders was reasonably permissible, the court below construed the Orders without regard to the previous administrative construction and practice of the Department, and as though this were not an administrative review proceeding, but an ordinary judicial action to deter-

mine in the first instance the meaning of the Orders.²⁵ This case presents no problem as to what the Secretary meant by the language of the Orders, for his meaning was clearly established (*supra*, pp. 3-5). The only question is whether the Secretary was so unskilled in the use of the English language that he wrote into the Orders the opposite of what he intended. An agency's construction of its rules is binding on a court.²⁶ *A fortiori*, the Secretary's construction of his Orders should likewise be accepted by the court.

The court below started its opinion by saying that the "main attack is on the Secretary's authority to draw various historical conclusions * * *" (R. 83). There can be no doubt about his authority to draw historical conclusions regarding public lands and the two Orders in question—he drafted the Orders, had the power to revoke or modify them and was entrusted with plenary power over the public lands.²⁷ If his "historical conclusions"—drawn from the facts of this case—were reasonable, then the judicial review should have ended with affirming his decision.

As to the Secretary's construction of Order 8979, the court below said "[T]here are persuasive counter-arguments to the Secretary's contentions" and that the language indicates "[T]hat the prohibition on disposition should be read in an expansive manner" for it was "more likely" that the prohibitory phrase in Order 8979 was

²⁵ "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge L. Co. v. United States*, 292 U.S. 282, 287; see also *Unemployment Comp. Comm. v. Aragon*, 329 U.S. 143, 153-154; *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473. As stated in *Pan American Petroleum Corporation v. Udall*, 192 F. Supp. 626, 628 (D.C. Dist. Col. 1963), the "power of the Court is limited to a review to determine whether the action of the Secretary was based on fraud, bad faith or lacked any rational basis in fact."

²⁶ See, e.g., *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414; also *Federal C. C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n. 6; *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 325.

²⁷ *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336. *Ickes v. Development Corp.*, 295 U.S. 639, 645.

"[U]sed to provide expansive coverage rather than the narrow coverage the Secretary now urges" (R. 89). Even if we were to assume that there are "counter-arguments" to the Secretary's construction, nevertheless, the court on judicial review should adopt a construction which will carry out the Secretary's intent, and not one which will defeat it. Also, if there are two constructions, one an expansive coverage and the other a narrow coverage, it was for the Secretary to decide which one to adopt, and his choice cannot be stricken down merely because the court would have made a different choice.

The opinion shows that the court became inextricably confused in its efforts to construe the two Orders. The confusion was caused in a large measure because the administrative record, other than the decisions of the Director of the Bureau of Land Management and the Secretary, was not before the court,²⁸ and the court was without the background, knowledge and expertise of the officers of the Department. Finally, it concluded without any administrative record support whatsoever, that the "Secretary's interpretation of the 1941 order [Order 8979] seems to us unreasonable and should not stand" (R. 90), but nowhere did it conclude that the Secretary's construction of PLO 487 was unreasonable, nor did it even say why it believed his construction of Order 8979 was unreasonable. Continuing in the same general language, the court below paid polite acknowledgment to the rules of agency construction of statutes and orders but brushed them aside as to Order 8979 with the comment that "Deference to agencies does not reach the extent of sanctioning irrational agency action, however; nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders * * *" (R. 90).

But the court below pointed to no orders which it con-

²⁸ The district court could not try the case *de novo*. *United States v. Ohio Oil Co.*, 163 F. 2d 633 (C.A. 9, 1947), certiorari denied 333 U.S. 833; *Adams v. United States*, 318 F.2d 861, 866-867 (C.A. 9, 1963).

sidered were "confusing" or "possibly conflicting." The two Orders under review were not conflicting because they were issued at different times and for different purposes. What orders the Secretary had issued to "frustrate judicial review" the court did not say, and there are no such orders. If any of the orders were confusing to the court, it was because it did not understand them or the practices of the Department. But this was no ground for striking down the Secretary's construction of his own orders.²⁹

²⁹ That the Department has managed the Range all along on the basis of its being open to oil and gas leasing is indisputably shown by the way it has consistently applied to the Range the oil and gas regulation applicable to all wildlife refuges open to leasing. See 43 CFR § 192.9 (1947), 12 F.R. 7334; 20 F.R. 9009 (1955); 23 F.R. 227 (1963); Notice, August 2, 1958, 23 F.R. 5883. Even the regional administrator in Alaska suspended action on all pending lease offers on Range lands following the receipt of a letter dated August 31, 1953 from the Bureau of Land Management requesting all regional administrators to suspend action on pending lease applications on wildlife refuges while the Department was studying a possible revision of the regulation (App. 13A). The suspension was "so that the applicants may retain their priority of filing until a definite policy is established" (App. 15A); and was a proper exercise of the Secretary's powers. See *Dunn v. Ickes*, 72 U.S. App. D.C. 325 F.2d 36, 37 (1940), certiorari denied 311 U.S. 698. The amended regulation of December 8, 1955 even went so far as to provide that no oil and gas leases would be issued on an area in the Range as described in Appendix B (not involved in this action), unless "a complete and detailed operation program *** is approved by the Director, Fish and Wildlife Service" (20 F.R. 9009). Thus, the bulk of the Range continued to be open to leasing, subject to the detailed program for operations. Again, when the Secretary amended the regulation on January 8, 1958, he prohibited the filing of lease offers on game range lands and Alaska wildlife areas until 10 days after the Fish and Wildlife Service and the Bureau of Land Management had reached an agreement defining the lands which "shall not be subject to oil and gas leasing." This amendment went on to provide that all pending lease offers on game range lands and Alaska wildlife areas would continue to be suspended until the agreement was completed. 23 F.R. 227. The amendment of January 8, 1958, was the first action ever taken by the Secretary to close all of the Range to oil and gas leasing, and even then the lands were only temporarily closed. Finally, when the agreement was completed, notice was given that the agreement had closed the southern part of the Range to oil and gas leasing, but had left the balance open. It was stated in the notice that the pending lease offers on the area not closed, which had been suspended, would then be adjudicated. Certainly the regulation and amendments are neither confusing nor conflicting, nor were they issued to frustrate judicial review.

Furthermore, the court did not overturn the Secretary's decision on the ground that the Range was left open by the two Orders, but was closed to oil and gas leasing by a subsequent regulation or order. It simply overturned his decision because it disagreed with his construction of the two Orders.

The rights and interests of the first qualified applicants and their assigns are properly to be considered before a construction is given the Orders which will nullify their leases and deprive them of the fruits of their large investments and enormous risks. If there is any doubt as to the meaning of the two Orders, then the Secretary correctly follows his consistent construction of them, and other similar orders. Long-continued reliance by private persons in good faith upon the Secretary's interpretations and practices is a justly compelling reason for not disturbing an established administrative course of conduct.³⁰

At this late date, any confusion or ambiguity in the Orders should be resolved in favor of the Secretary's construction, and the validity of the leases based on that construction. This most assuredly would be the rule were this an action by the United States to nullify the leases instead of being an action by respondents for the same purpose.³¹

G. *The owners of the leases declared to be nullities are indispensable parties.* Amici own many of the leases which the court below held are nullities. They are the real parties in interest, and the ones who stand to lose if the Secretary's decision is overturned. They had no notice or knowledge of this action until after the decision of the court below. The absence of indispensable parties may be raised *sua sponte*, for the question goes to a court's equitable jurisdiction. *Hooey v. Wilson*, 9 Wall. (76 U.S.) 501, 503-504. Amici's indispensability was brought to this Court's attention in the

³⁰ See, e.g., *McLaren v. Fleischer*, 256 U.S. 477, 481; also *Burnet v. Guggenheim*, 288 U.S. 280, 285-286; *Sorrells v. United States*, 287 U.S. 435, 446; *Provident Life & Trust Co. v. Mercer County*, 170 U.S. 593, 599; *Griffith v. Bogert*, 18 How. (59 U.S.) 158, 163.

³¹ *Cole v. Young*, 351 U.S. 536, 556.

petition for certiorari (Pet. 2, n. 2; 17-20) and in amici's brief in support of the petition (pp. 11-12), and is argued again in the brief amicus of Standard Oil Company and Richfield Oil Corporation. Even if the latent question is not entirely jurisdictional, *Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193, 198, nevertheless, a decision adverse to amici should not be entered in their absence, although one in favor of the Secretary would be proper. *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 71.

CONCLUSION

For the reasons stated, amici curiae urge that the judgment be reversed.

Respectfully submitted,

CLAYTON L. ORN,
Marathon Oil Company Building,
Findlay, Ohio.

MARVIN J. SONOSKY,
JOHN S. WHITE,
1225 19th Street, N. W.,
Washington, D. C.

OSCAR L. CHAPMAN,
MARTIN L. FRIEDMAN,
923 Pennsylvania Building,
Washington, D. C.
Attorneys for Marathon Oil Company

MARION B. PLANT,
One Eleven Sutter Street,
San Francisco, California
*Attorney for Union Oil Company of
California*

August 1964

APPENDIX

1. TABLES SHOWING EXECUTIVE AND PUBLIC LAND ORDERS CONTAINING LANGUAGE IDENTICAL TO OR SUBSTANTIALLY THE SAME AS EXECUTIVE ORDER 8979 AND PUBLIC LAND ORDER 487 AND REPORTS OF MONTANA AND WYOMING LAND OFFICES ON OIL AND GAS LEASES ISSUED FOR LAND WITHDRAWN BY SUCH ORDERS.

TABLE I

EXECUTIVE AND PUBLIC LAND ORDERS CONTAINING
LANGUAGE SUBSTANTIALLY THE SAME AS
EXECUTIVE ORDER 8979

Order	Date	Order	Date	Order	Date
1. 3209*	1-3-20	36. 4084	10-10-24	71. 4425	4-19-26
2. 3264*	4-29-20	37. 4093*	10-10-24	72. 4426	4-19-26
3. 3307*	7-13-20	38. 4100	11-7-24	73. 4430	4-23-26
4. 3351*	11-6-20	39. 4109	12-8-24	74. 4440	5-11-26
5. 3631*	2-3-22	40. 4163*	2-27-25	75. 4460	6-18-26
6. 3637*	2-16-22	41. 4177*	3-18-25	76. 4468	6-30-26
7. 3672*	5-8-22	42. 4190	4-3-25	77. 4474*	7-10-26
8. 3674*	5-17-22	43. 4212	4-25-25	78. 4478	7-15-26
9. 3775*	1-13-23	44. 4213	4-25-25	79. 4482	7-19-26
10. 3812*	4-9-23	45. 4219	5-8-25	80. 4494	8-12-26
11. 3825*	4-14-23	46. 4222	5-11-25	81. 4500	8-19-26
12. 3857	5-31-23	47. 4229	5-19-25	82. 4506	9-11-26
13. 3858	6-1-23	48. 4232	5-25-25	83. 4531	10-27-26
14. 3866	6-14-23	49. 4237	6-1-25	84. 4539	11-6-26
15. 3892	8-13-23	50. 4253	6-12-25	85. 4549	12-6-26
16. 3894	8-21-23	51. 4258	7-1-25	86. 4556	12-18-26
17. 3895*	8-23-23	52. 4262	7-3-25	87. 4573	1-28-27
18. 3909	9-23-23	53. 4267	7-16-25	88. 4582	2-12-27
19. 3914	10-5-23	54. 4297*	8-27-25	89. 4586	2-16-27
20. 3918	10-29-23	55. 4309	9-24-25	90. 4608	3-10-27
21. 3945	1-21-24	56. 4311	9-25-25	91. 4624	4-1-27
22. 3946*	1-21-24	57. 4322	10-15-25	92. 4638	4-26-27
23. 3954	2-6-24	58. 4323	10-15-25	93. 4654	5-23-27
24. 3958	2-15-24	59. 4326	10-20-25	94. 4657	6-6-27
25. 3960	2-18-24	60. 4327	10-21-25	95. 4683	7-4-27
26. 3967	3-5-24	61. 4346	11-23-25	96. 4693	7-18-27
27. 3971	3-12-24	62. 4348	11-28-25	97. 4695	7-25-27
28. 3998*	4-23-24	63. 4355	12-12-25	98. 4699	8-1-27
29. 4000	4-30-24	64. 4361	12-23-25	99. 4715	9-8-27
30. 4025*	6-12-24	65. 4366	1-14-26	100. 4725	9-27-27
31. 4041	6-27-24	66. 4388	3-6-26	101. 4726	9-27-27
32. 4042	7-2-24	67. 4404*	3-27-26	102. 4745	10-21-27
33. 4061	8-12-24	68. 4412	4-7-26	103. 4763	11-21-27
34. 4070*	9-4-24	69. 4423	4-19-26	104. 4764	11-21-27
35. 4082*	10-6-24	70. 4424	4-19-26	105. 4766	11-25-27

NOTE: All orders are collected in the Department of Interior Library, Washington, D. C. Orders marked with an asterisk (*) use the phraseology "are withdrawn from settlement, location, sale, entry, or other form of disposition [or disposal]." Other orders use the word "appropriation" in place of "disposition" or "disposal."

TABLE I—Continued

	Order	Date		Order	Date		Order	Date
106.	4798	1-23-28	159.	5343	5-6-20	212.	5920	9-15-32
107.	4827	3-12-28	160.	5346	5-9-30	213.	5942	10-29-32
108.	4828	3-12-28	161.	5354	5-27-30	214.	5949*	11-16-32
109.	4843	3-23-28	162.	5395	7-16-30	215.	5958	12-8-32
110.	4844	3-23-28	163.	5450	9-25-30	216.	6014	2-6-33
111.	4867*	4-28-28	164.	5452	9-25-30	217.	6054	2-28-33
112.	4882	5-16-28	165.	5465	10-20-30	218.	6055	2-8-33
113.	4900	6-2-28	166.	5483	11-14-30	219.	6075	3-15-33
114.	4914	6-23-28	167.	5484*	11-14-30	220.	6076	3-15-33
115.	4921	6-29-28	168.	5504	12-4-30	221.	6077	3-15-33
116.	4942	7-30-28	169.	5531	1-13-31	222.	6082	3-25-33
117.	4957	9-3-28	170.	5538	1-23-31	223.	6087	3-28-33
118.	4960	9-12-28	171.	5542	1-27-31	224.	6119	5-2-33
119.	4962	9-17-28	172.	5547	1-31-31	225.	6120	5-2-33
120.	4964	9-17-28	173.	5548	1-31-31	226.	6122	5-2-33
121.	4980	10-20-28	174.	5550*	2-6-31	227.	6123	5-2-33
122.	4997	11-19-28	175.	5551	2-7-31	228.	6124	5-2-33
123.	5003*	12-3-28	176.	5555	2-11-31	229.	6153	6-3-33
124.	5029	1-18-29	177.	5558	2-16-31	230.	6179	6-16-33
125.	5030	1-18-29	178.	5571	3-5-31	231.	6192	7-3-33
126.	5031	1-18-29	179.	5581*	3-17-31	232.	6258	7-3-33
127.	5085	3-28-29	180.	5585	3-30-31	233.	6266	9-6-33
128.	5091	4-9-29	181.	5596	4-9-31	234.	6267	9-6-33
129.	5098	4-23-29	182.	5603	4-20-31	235.	6268	9-6-33
130.	5109	5-13-29	183.	5623	5-15-31	236.	6286	9-14-33
131.	5115	5-15-29	184.	5663	5-28-31	237.	6287	9-14-33
132.	5116	5-15-29	185.	5640	6-8-31	238.	6288	9-14-33
133.	5121	5-18-29	186.	5652	6-18-31	239.	6432	11-16-33
134.	5125*	5-23-29	187.	5656	6-22-31	240.	6473	12-4-33
135.	5140	6-20-29	188.	5664	7-2-31	241.	6491	12-12-33
136.	5144	6-25-29	189.	5667	7-6-31	242.	6496	12-14-33
137.	5165	7-26-29	190.	5668	7-6-31	243.	6499	12-15-33
138.	5166	7-26-29	191.	5671*	7-29-31	244.	6574	1-24-34
139.	5172	8-9-29	192.	5681	8-12-31	245.	6688	2-6-34
140.	5202	10-7-29	193.	5682	8-12-31	246.	6604	2-16-34
141.	5208	10-12-29	194.	5687	8-18-31	247.	6707	5-9-34
142.	5218	11-4-29	195.	5709	9-11-31	248.	6957.	2-4-35
143.	5234	12-4-29	196.	5729	10-2-31	249.	6958	2-4-35
144.	5241	12-16-29	197.	5789	2-2-32	250.	7023	4-22-35
145.	5251	12-31-29	198.	5790	2-2-32	251.	7035	5-6-35
146.	5255	12-31-29	199.	5791	2-2-32	252.	7172	5-4-35
147.	5257	1-9-30	200.	5792	2-2-32	253.	7320	3-19-36
148.	5261	1-20-30	201.	5796	2-10-32	254.	7331	4-3-36
149.	5287	2-25-30	202.	5805	2-23-32	255.	7364	5-6-36
150.	5297	3-10-30	203.	5807	2-25-32	256.	7417	7-17-36
151.	5300	3-11-30	204.	5815	3-9-32	257.	7425	8-1-36
152.	5304	3-14-30	205.	5827	3-28-32	258.	8004	11-12-38
153.	5309	3-24-30	206.	5828	3-30-32	259.	8102	4-29-39
154.	5315	3-26-30	207.	5829	3-30-32	260.	8343	2-10-40
155.	5323	4-10-30	208.	5843	4-28-32	261.	8505*	8-7-40
156.	5328	4-15-30	209.	5862	6-23-32	262.	8733	4-10-41
157.	5341	5-2-30	210.	5886	7-12-32	263.	8857*	8-19-41
158.	5342	5-6-30	211.	5894	7-26-32	264.	FLO 746*	8-17-51

TABLE II

EXECUTIVE AND PUBLIC LAND ORDERS CONTAINING
LANGUAGE IDENTICAL TO OR SUBSTANTIALLY THE
SAME AS PUBLIC LAND ORDER 487

Order	Date	Order	Date	Order	Date
1. 3208	1-2-20	46. 3658	4-4-22	91. 4387	3-5-26
2. 3242	3-6-20	47. 3661	4-13-22	92. 4397	3-17-26
3. 3263	4-28-20	48. 3678	5-20-22	93. 4411	4-1-26
4. 3269	5-1-20	49. 3684	5-25-22	94. 4415	4-10-26
5. 3271	5-11-20	50. 3685	5-27-22	95. 4433	4-24-26
6. 3278	5-28-20	51. 3729	8-31-22	96. 4449	5-29-26
7. 3282	6-12-20	52. 3737	9-23-22	97. 4456	6-7-26
8. 3284	6-18-20	53. 3743	9-30-22	98. 4456-A	6-8-26
9. 3291	6-26-20	54. 3747	10-16-22	99. 4491	8-3-26
10. 3295	6-28-20	55. 3748	10-23-22	100. 4515	9-23-26
11. 3297	6-30-20	56. 3755	11-17-22	101. 4522	10-14-26
12. 3305	7-10-20	57. 3763	12-9-22	102. 4546	11-29-26
13. 3308	7-14-20	58. 3766	12-19-22	103. 4554	12-17-26
14. 3309	7-17-20	59. 3781	1-31-23	104. 4559	12-30-26
15. 3314	7-26-20	60. 3783	2-8-23	105. 4578	1-29-27
16. 3328	9-23-20	61. 3800	3-2-23	106. 4599	3-1-27
17. 3333	10-3-20	62. 3813	4-9-23	107. 4613	3-14-27
18. 3335	10-7-20	63. 3814	4-9-23	108. 4616	3-18-27
19. 3345	10-23-20	64. 3815	4-9-23	109. 4633	4-18-27
20. 3346	10-26-20	65. 3832	5-4-23	110. 4631	4-15-27
21. 3355	11-19-20	66. 3889	8-13-23	111. 4652	5-18-27
22. 3373	12-22-20	67. 3891	8-13-23	112. 4677	6-29-27
23. 3387	1-22-21	68. 3896	8-31-23	113. 4685	7-7-27
24. 3388	1-22-21	69. 3898	9-6-23	114. 4700	8-5-27
25. 3393	1-28-21	70. 3911	10-4-23	115. 4702	8-10-27
26. 3394	1-28-21	71. 3924	11-9-23	116. 4710	8-29-27
27. 3395	1-28-21	72. 3948	1-25-24	117. 4732	9-30-27
28. 3405	2-12-21	73. 3975	3-21-24	118. 4762	11-19-27
29. 3410	2-22-21	74. 3984	4-2-24	119. 4774	11-29-27
30. 3411	2-22-21	75. 4014	5-22-24	120. 4781	12-14-27
31. 3412	2-25-21	76. 4033-A	6-24-24	121. 4785	12-17-27
32. 3450	5-3-21	77. 4106	11-24-24	122. 4786	12-17-27
33. 3451	5-3-21	78. 4146	2-25-25	123. 4796	1-19-28
34. 3465	5-19-21	79. 4149	2-6-25	124. 4806	2-11-28
35. 3509	7-5-21	80. 4178	3-19-25	125. 4810	2-14-28
36. 3537	8-17-21	81. 4209	4-22-25	126. 4812	2-21-28
37. 3552	9-23-21	82. 4227	5-16-25	127. 4845	3-26-28
38. 3561	10-18-21	83. 4280	8-7-25	128. 4848	4-2-28
39. 3617	1-13-22	84. 4289	8-22-25	129. 4857	4-16-28
40. 3626	1-25-22	85. 4303	9-17-25	130. 4870	5-3-28
41. 3644	2-28-22	86. 4317	10-2-25	131. 4872	5-3-28
42. 3649	3-20-22	87. 4342	11-12-25	132. 4873	5-3-28
43. 3650	3-20-22	88. 4364	1-7-26	133. 4888	5-25-28
44. 3651	3-22-22	89. 4375	1-30-26	134. 4896	5-28-28
45. 3655	3-29-22	90. 4378	2-2-26	135. 4901	6-4-28

NOTE: All orders are collected in the Department of Interior Library, Washington, D. C. After 1942, orders of withdrawal were denominated Public Land Orders and the series was renumbered.

TABLE II—Continued

Order	Date	Order	Date	Order	Date
136. 4916	6-23-28	189. 5462	10-14-30	242. 6441	11-21-33
137. 4920	6-26-28	190. 5472	10-27-30	243. 6541	12-28-33
138. 4939	7-23-28	191. 5478	11-8-30	244. 6544	12-30-33
139. 4941	7-27-28	192. 5479	11-15-30	245. 6583	2-3-34
140. 4951	8-17-28	193. 5495	11-22-30	246. 6587	2-6-34
141. 4953	8-20-28	194. 5500	12-2-30	247. 6592	2-9-34
142. 4963	9-17-28	195. 5511	12-11-30	248. 6607	2-20-34
143. 5004	12-3-28	196. 5512	12-11-30	249. 6616	2-26-34
144. 5005	12-5-28	197. 5534	1-2-31	250. 6618	2-26-34
145. 5025	1-14-29	198. 5559	2-16-31	251. 6619	2-26-34
146. 5033	1-19-29	199. 5593	4-4-31	252. 6626	3-5-34
147. 5037	1-28-29	200. 5594	4-6-31	253. 6628	3-5-34
148. 5038	2-2-29	201. 5601	4-16-31	254. 6629	3-5-34
149. 5040	2-4-29	202. 5611	4-24-31	255. 6644	3-14-34
150. 5041	2-9-29	203. 5629	5-21-31	256. 6645	3-14-34
151. 5108	5-10-29	204. 5631	5-26-31	257. 6667	4-5-34
152. 5117	5-16-29	205. 5650	6-18-31	258. 6671	4-7-34
153. 5118	5-16-29	206. 5654	6-20-31	259. 6672	4-7-34
154. 5138	6-17-29	207. 5672	8-3-31	260. 6681	4-17-34
155. 5141	6-20-29	208. 5683	8-21-31	261. 6696	5-2-34
156. 5176	8-23-29	209. 5684	8-21-31	262. 6698	5-2-34
157. 5182	8-29-29	210. 5694	8-25-31	263. 6704	5-8-34
158. 5190	9-11-29	211. 5702	9-1-31	264. 6706	5-9-34
159. 5194	9-16-29	212. 5711	9-14-31	265. 6714	5-23-34
160. 5196	9-21-29	213. 5714	9-15-31	266. 6721	5-25-34
161. 5203	10-8-29	214. 5726	9-26-31	267. 6733	6-7-34
162. 5214	10-30-29	215. 5732	10-14-31	268. 6740	6-15-34
163. 5222	11-22-29	216. 5754	12-7-31	269. 6741	6-15-34
164. 5229	11-25-29	217. 5755	12-10-31	270. 6761	6-29-34
165. 5233	12-4-29	218. 5794	2-5-32	271. 6762	6-29-34
166. 5249	12-31-29	219. 5838	4-18-32	272. 6774	6-30-34
167. 5219	11-5-29	220. 5846	5-2-32	273. 6781	6-30-34
168. 5270	2-4-30	221. 5846	6-23-32	274. 6795	7-26-34
169. 5273	2-7-30	222. 5889	7-16-32	275. 6796	7-27-34
170. 5274	2-7-30	223. 5898	8-2-32	276. 6798	7-27-34
171. 5275	2-7-30	224. 5902	8-8-32	277. 6802	8-4-34
172. 5278	2-7-30	225. 5907	8-18-32	278. 6804	8-4-34
173. 5280	2-17-30	226. 5928	9-29-32	279. 6805	8-4-34
174. 5292	3-5-30	227. 5929	10-1-32	280. 6807	8-4-34
175. 5319	4-7-30	228. 6002	1-18-33	281. 6815	8-10-34
176. 5326	4-14-30	229. 6006	1-23-33	282. 6816	8-10-34
177. 5344	5-8-30	230. 6019	2-7-33	283. 6817	8-10-34
178. 5352	5-23-30	231. 6025	2-14-33	284. 6819	8-11-34
179. 5361	6-4-30	232. 6040	2-20-33	285. 6822	8-13-34
180. 5362	6-4-30	233. 6113	4-22-33	286. 6827	8-21-34
181. 5364	6-5-30	234. 6116	4-29-33	287. 6833	8-28-34
182. 5380	6-24-30	235. 6143	5-23-33	288. 6842	9-11-34
183. 5389	7-7-30	236. 6184	6-26-33	289. 6843	9-11-34
184. 5397	7-18-30	237. 6205	7-14-33	290. 6844	9-11-34
185. 5401	7-23-30	238. 6206	7-16-33	291. 6845	9-11-34
186. 5407	7-25-30	239. 6276	9-8-33	292. 6851	9-22-34
187. 5428	8-20-30	240. 6277	9-8-33	293. 6853	9-22-34
188. 5451	9-25-30	241. 6331	10-11-33	294. 6863	10-3-34

TABLE II—Continued

Order	Date	Order	Date	Order	Date
295. 6867	10-5-34	335. 7623	5-29-37	374. 8540	9-14-40
296. 6883	10-22-34	336. 7628	6-8-37	375. 8573	10-21-40
297. 6884	10-23-34	337. 7647	6-28-37	376. 8577	10-29-40
298. 6888	10-29-34	338. 7691	8-17-37	377. 8591	11-8-40
299. 6890	10-30-34	339. 7695	8-23-37	378. 8592	11-12-40
300. 6908	11-21-34	340. 7705	9-11-37	380. 8598	11-18-40
301. 6909	11-21-34	341. 7707	9-11-37	381. 8600	11-20-40
302. 6912	12-3-34	342. 7713	9-23-37	382. 8655	1-30-41
303. 6946	1-11-35	343. 7722	10-8-37	383. 8646	1-22-41
304. 6973	2-19-35	344. 7723	10-8-37	384. 8691	2-20-41
305. 7032	5-1-35	345. 7740	11-15-37	385. 8732	4-8-41
306. 7045	5-15-35	346. 7748	11-20-37	386. 8733	4-10-41
307. 7079	6-17-35	347. 7770	12-14-37	387. 8739	4-21-41
308. 7112	7-24-35	348. 7925	7-5-38	388. 8776	6-10-41
309. 7135	8-9-35	349. 7951	8-12-38	389. 9028	1-20-42
310. 7178	9-6-35	350. 7960	8-22-38	390. 9101	3-16-42
311. 7220	10-30-35	351. 7993	10-27-38	391. PLO 23	8-7-42
312. 7270	1-7-36	352. 8009	11-18-38	392. 46	10-8-42
313. 7303	2-25-36	353. 8010	11-18-38	393. 69	12-15-42
314. 7309	2-28-36	354. 8020	12-2-38	394. 107	3-31-43
315. 7339	4-10-36	355. 8021	12-5-38	395. 156	8-4-43
316. 7386	6-8-36	356. 8072	3-21-39	396. 225	4-21-44
317. 7430	8-17-36	357. 8085	4-11-39	397. 226	4-21-44
318. 7435	8-19-36	358. 8089	4-13-39	398. 294	8-13-45
319. 7441	8-29-36	359. 8101	4-28-39	399. 317	4-15-46
320. 7442	8-31-36	360. 8192	7-5-39	400. 324	8-14-46
321. 7448	9-12-36	361. 8216	7-25-39	401. 371	5-26-47
322. 7453	9-23-36	362. 8299	12-4-39	402. 486	6-15-48
323. 7504	12-11-36	363. 8325	1-22-40	403. 487	6-16-48
324. 7505	12-11-36	364. 8330	1-24-40	404. 513	8-12-48
325. 7510	12-11-36	365. 8332	1-25-40	405. 540	12-21-48
326. 7515	12-16-36	366. 8342	2-9-40	406. 636	3-18-50
327. 7520	12-18-36	367. 8344	2-10-40	407. 642	5-9-50
328. 7523	12-21-36	368. 8397	4-23-40	408. 664	8-28-50
329. 7544	1-29-37	369. 8407	5-10-40	409. 713	4-16-51
330. 7555	2-17-37	370. 8411	5-16-40	410. 737	7-28-51
331. 7558	2-23-37	371. 8468	7-1-40	411. 761	10-25-51
332. 7596	3-31-37	372. 8480	7-12-40	412. 797	1-25-52
333. 7601	4-7-37	373. 8492	7-23-40	413. 814	4-1-52
334. 7622	5-29-37				

TABLE III

EXECUTIVE AND PUBLIC LAND ORDERS CONTAINING
LANGUAGE BARRING MINERAL LEASING

	Order	Date		Order	Date		Order	Date
1.	8508	8-8-40	48.	480	6-2-48	95.	656	8-15-50
2. PLO	12	7-20-42	49.	497	7-13-48	96.	659	8-24-50
3.	61	11-8-42	50.	509	7-30-48	97.	660	8-24-50
4.	84	1-28-43	51.	510	8-4-48	98.	662	8-28-50
5.	89	2-10-43	52.	511	8-4-48	99.	663	8-28-50
6.	92	2-19-43	53.	515	8-13-48	100.	665	8-28-50
7.	97	3-16-43	54.	516	8-17-48	101.	669	9-1-50
8.	144	6-24-43	55.	524	10-20-48	102.	671	9-11-50
9.	155	8-4-43	56.	533	11-24-48	103.	672	10-3-50
10.	158	8-12-43	57.	534	11-24-48	104.	673	10-3-50
11.	175	9-29-43	58.	544	1-4-49	105.	676	10-3-50
12.	213	3-10-44	59.	545	1-7-49	106.	677	10-13-50
13.	233	6-3-44	60.	546	1-7-49	107.	678	10-24-50
14.	239	6-28-44	61.	547	1-19-49	108.	689	11-20-50
15.	249	11-17-44	62.	548	1-6-49	109.	690	11-22-50
16.	256	1-4-45	63.	553	2-7-49	110.	692	12-8-50
17.	261	1-24-45	64.	554	2-7-49	111.	693	12-12-50
18.	265	3-8-45	65.	555	2-8-49	112.	697	2-2-51
19.	266	3-16-45	66.	576	3-29-49	113.	706	3-15-51
20.	268	3-20-45	67.	557	3-29-49	114.	709	4-10-51
21.	275	4-23-45	68.	582	4-11-49	115.	712	4-16-51
22.	277	5-14-45	69.	586	5-20-49	116.	714	4-20-51
23.	279	5-22-45	70.	587	5-23-49	117.		5-15-51
24.	280	5-22-45	71.	589	6-9-49	118.	722	5-23-51
25.	281	5-29-45	72.	592	6-16-49	119.	724	5-24-51
26.	283	5-31-45	73.	593	7-8-49	120.	726	6-6-51
27.	290	7-25-45	74.	595	7-18-49	121.	727	6-6-51
28.	293	8-25-45	75.	601	8-10-49	122.	730	6-25-51
29.	316	3-5-46	76.	602	8-12-49	123.	731	6-25-51
30.	318	5-13-46	77.	604	9-3-49	124.	733	7-18-51
31.	322	7-3-46	78.	605	9-7-49	125.	738	7-28-51
32.	329	10-17-46	79.	606	9-13-49	126.	739	7-28-51
33.	334	12-19-46	80.	609	10-10-49	127.	751	8-29-51
34.	349	2-12-47	81.	613	10-19-49	128.	754	9-14-51
35.	386	7-31-47	82.	615	11-8-49	129.	755	9-21-51
36.	419	10-21-47	83.	619	12-2-49	130.	765	11-23-51
37.	431	12-19-47	84.	626	12-16-49	131.	770	12-12-51
38.	435	1-12-48	85.	627	1-11-50	132.	774	12-19-51
39.	436	1-13-48	86.	628	1-13-50	133.	776	12-29-51
40.	439	1-20-48	87.	629	1-13-50	134.	778	12-29-51
41.	443	1-30-48	88.	637	4-7-50	135.	780	12-29-51
42.	460	4-1-48	89.	639	4-26-50	136.	781	12-29-51
43.	461	4-1-48	90.	640	5-3-50	137.	783	1-2-52
44.	462	4-1-48	91.	646	5-10-50	138.	786	1-5-52
45.	463	4-2-48	92.	649	6-12-50	139.	792	1-9-52
46.	474	4-30-48	93.	651	6-26-50	140.	788	1-10-52
47.	478	5-7-48	94.	652	6-26-50	141.	790	1-16-52

NOTE: All orders are collected in the Department of the Interior Library, Washington, D. C. After 1942, orders of withdrawal were denominated Public Land Orders and the series was renumbered.

TABLE III—Continued

Order	Date	Order	Date	Order	Date
142. 794	1-23-52	153. 827	5-16-52	164. 859	7-29-52
143. 800	2-1-52	154. 833	5-21-52	165. 861	9-3-52
144. 802	2-5-52	155. 835	5-23-52	166. 868	10-21-52
145. 805	2-12-52	156. 837	6-19-52	167. 869	10-24-52
146. 808	2-27-52	157. 843	6-24-52	168. 871	11-5-52
147. 813	3-18-52	158. 844	6-24-52	169. 873	11-14-52
148. 815	4-8-52	159. 848	7-1-52	170. 874	11-28-52
149. 818	4-14-52	160. 849	7-1-52	171. 875	12-10-52
150. 821	4-28-52	161. 851	7-1-52	172. 876	12-10-52
151. 822	5-9-52	162. 854	7-10-52	173. 877	12-10-52
152. 823	5-9-52	163. 856	7-21-52		

TABLE IV

**OIL AND GAS LEASES ISSUED ON LANDS WITHDRAWN BY
ORDERS CONTAINING LANGUAGE IDENTICAL TO OR
SUBSTANTIALLY THE SAME AS EXECUTIVE ORDER
8979 AND PUBLIC LAND ORDER 487**

1. Lands in the Fort Peck Dam and Reservoir Project, Montana, were withdrawn at different dates by separate orders. The bulk of the lands were withdrawn by Executive Order 6491, December 12, 1933; Executive Order 6707, May 9, 1934; and Executive Order 7331, April 8, 1936, 1 F.R. 121. Each order is substantially the same as Order 8979. All are in force. They provide that the lands are "withdrawn from settlement, location, sale, entry, and all forms of appropriation." At least 264 leases were issued on lands withdrawn by these orders up to January 8, 1958, the effective date of the amendment to the Secretary's leasing regulation. See Memorandum, May 4, 1964, State Director, Bureau of Land Management, Montana, *infra*, 10A.

The same lands were also subject to the top withdrawal for the Charles M. Russell Game Range, formerly the Fort Peck Game Range, established by Executive Order 7509, December 11, 1936; 1 F.R. 2482. The Game Range withdrawal provided that nothing in the order would prevent the leasing of oil and gas.

Prior to March 22, 1956, about 476 oil and gas leases had been issued on all of the Fort Peck Game Range lands. H. Rept. No. 1941, 84th Cong., 2d Sess., March 22, 1956, pp. 3-4, 8, Appendix, p. 18, to report. Since January 8, 1958, no new oil and gas leases have been issued, and many of the pre-1958 leases have terminated. However, leasing is halted because of 43 CFR § 192.9 (now 43 CFR § 3120.3-3), and not because of the withdrawals for the Fort Peck Dam and Reservoir Project. See Memorandum, May 4, 1964, State Director, Bureau of Land Management, Montana, *infra*, 10A-11A.

2. Executive Order 5711, September 14, 1931, withdrew about 90,000 acres for classification and in aid of legislation. The language of withdrawal is identical to PLO 487. The order is in force. A total of 80 oil and gas leases were issued for the area and about 12 are outstanding. See Memorandum, May 4, 1964, State Director, Bureau of Land Management, Montana, *infra*, 10A.

3. Executive Order 6441, November 21, 1933, withdrew approximately 5200 acres for classification and in aid of legislation. The language of withdrawal is identical to PLO 487. The order is in force. Between March 1, 1954 and November 1, 1957, six leases covering about 1022 acres were issued and between January 1, 1959 and December 1, 1961, eight leases covering 2512 acres were issued. See Memorandum, May 4, 1964, State Director, Wyoming, *infra*, 11A.

4. Executive Order 7491, November 17, 1936, 1 F.R. 1866, withdrew about 4240 acres for an Army target range. The language of withdrawal is identical to PLO 487. The order is in force. Two leases were issued in 1953 (302 acres); one each in 1954 and 1955 (720 acres); three in 1960 (480 acres), one each in 1961 and 1962 (728 acres), and one in 1963 (1211 acres). See Memorandum,

TABLE IV—Continued

May 4, 1964, State Director, Bureau of Land Management, Wyoming, *infra*, 12A.

5. Executive Order 7960, August 22, 1938, 3 F.R. 2072 withdrew lands for the Tongue River Reservoir Site, Montana. The language of withdrawal is identical to PLO 487. The order is in force. There were eight leases issued for the lands, none of which are now outstanding. See Memorandum, May 4, 1964, State Director, Bureau of Land Management, Montana, *infra*, 10A.

6. Executive Order 8101, April 28, 1939, 4 F.R. 1725, also withdrew lands for an Army target range. The language of withdrawal is identical to PLO 487. The order is in force. Three leases have been issued for a total of 1560 acres. See Memorandum, May 4, 1964, State Director, Bureau of Land Management, Wyoming, *infra*, 11A.

7. Executive Order 8592, November 12, 1940, 5 F.R. 4478, withdrew about 1400 acres as an addition to the Bowdoin National Wildlife Refuge established by Executive Order 7295, February 14, 1936, with the exception that the lands were in Petroleum Reserve No. 53, Montana No. 6, and were subject to competitive development. The language of withdrawal is identical to PLO 487. Two leases were issued for these lands. See also H. Rept. No. 1941, 84th Cong., 2d Sess., March 22, 1956, p. 8, Appendix p. 18 to report.

8. Executive Order 8924, October 25, 1941, 6 F.R. 5507, withdrew approximately 2960 acres of land for the Creedman Coulee National Wildlife Refuge, Montana. The order provides that the lands are " * * * withdrawn from all forms of appropriation under the public-land laws, including the mining laws * * * ." The order is in force. Three oil and gas leases were issued for the area. Memorandum, May 4, 1964, State Director, Bureau of Land Management, Montana, *infra*, 10A; See H. Rept. No. 1941, *supra*, Appendix A. p. 15 to report.

9. Executive Order 9132, April 13, 1942, 7 F.R. 2827, withdrew approximately 7475 acres for the Fort Peck Dam and Reservoir Project, Montana. The language of withdrawal is identical to Executive Order 8924 (Item 8, *supra*). The order is in force. A total of 17 oil and gas leases were issued for the area. Memorandum, May 4, 1964, State Director, Bureau of Land Management, Montana, *infra*, 10A.

TABLE IV—Continued
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

State Office
1245 North 39th Street
Billings, Montana
59101

May 4, 1964

Memorandum

To: Director, Bureau of Land Management, Washington, D. C. 20240
From: State Director, Montana
Subject: Oil and Gas Leasing on Withdrawn Land FD May 4, 1964,
Your Memorandum April 23, 1964, Ref: 3120 (6.30c)

Below is a tabulation supplying the information requested in the subject named memorandum.

OG Offers Current	Existing Leases	Relinquished, Terminated and Expired Leases
	EO 6491	
4	0	134
	EO 6707	
3	3	128
	EO 7331	
0	1	2
	EO 9132	
0	0	17
	EO 8924	
0	0	3
	EO 5711	
0	12	80
	EO 7960	
1	0	8
	EO 8592	
0	0	2

The new records, which are in use in the Montana Land Office, are not designed to retain a history of applications of any nature except withdrawals. An application appears only on the plat and if either rejected or withdrawn it is removed and its history is then lost.

A word of explanation is in order concerning the Executive Orders withdrawing lands for the Fort Peck Dam. The entire area withdrawn for the Fort Peck Dam is top withdrawn for the Charles M. Russell Game Refuge, formerly Fort Peck Game Range. Before 43 CFR 3120.3-3 (formerly 192.9) became effective, leases were issued on the game range and Fort Peck Dam lands.

TABLE IV—Continued

This accounts for the large number of expired and terminated leases in this area. Today, leases are not being issued because of the game range withdrawal, not because of the Fort Peck Dam withdrawal.

/s/ E. D. ROWLAND

UNITED STATES GOVERNMENT

TO: Director

DATE: MAY 4, 1964

FROM: State Director, Wyoming

In reply refer to:

3120 (230)

Your reference:

3120 (6.03c)

SUBJECT: Oil and Gas Leasing on withdrawn Lands
FD May 4, 1964

We find no applications for oil and gas leases or issued leases on lands covered by E. O. 5949 or E. O. 7425.

The following is a list of leases issued on lands covered by E. O. 6441, dated November 21, 1933, which is still in effect.

Serial No.	Issued	Lessee	Acreage under E. O.	Terminated
Wyoming—				
025886	3-1-54	F. P. Fuller	375.89	2-26-57
028198	8-1-54	Wm. & Elsie Schmidke	147.36	7-31-57
044313-B	11-1-56	Tom Palmer, Inc.	38.79	10-31-61
049916	9-1-57	Amerada Petroleum Co.	80.00	8-1-62
053771	9-1-57	Elaine Maulsof	40.00	9-1-60
053871	11-1-57	Joe W. Lackey	40.00	10-31-60
071581	1-1-59	A. T. Wallace	394.04	12-31-61
075909	4-1-59	C. A. McDade	759.66	3-31-63
075909-A	4-1-59	C. A. McDade	80.00	3-31-63
075910	4-1-59	Harriett D. Elliott	520.00	3-31-63
076752	5-1-59	Loma Corporation	80.00	still in eff.
077650	8-1-59	E. V. Stipp	40.00	7-31-62
089457	2-1-60	K. J. Bules	40.00	1-31-63
0161169	12-1-61	Chester & Stella Fankhauser	597.78	11-30-63

Under E. O. 7491, dated November 14, 1936, certain lands were withdrawn for the Lovell, Wyoming Target Range. The lands have been separated into a "danger zone" and lands outside the danger zone. The E. O. is still in effect.

We have one pending application for an oil and gas lease within and without the danger zone: Wyoming 0285594, filed 10-31-63 for 1152.22 acres by Woreed Oil Company.

TABLE IV—Continued

Leases which have issued on lands outside the danger zone are as follows:

Serial No.	Issued	Lessee	Acreage
Wyoming—			
013825.	4-1-53	F. R. Long	80.00
013825-A	4-1-53	Mohawk Petroleum Corp.	222.00
015046	9-1-54	Union Oil Co. of Calif.	415.58
030853	2-1-55	Woreed Oil Company	305.00
091832-A	3-1-60	Glenn W. Hart	320.00
091832-C	3-1-60	Margaret K. Paumier	80.00
091832-D	3-1-60	Samuel Berman	80.00
0105220	2-1-61	Woreed Oil Company	20.00
0183905	5-1-62	The Pure Oil Company	708.59
0262347	9-1-63	Woreed Oil Company	1210.75

E. O. 8101, dated April 28, 1939, withdrew lands for the Lander, Wyoming Target Range. This order is still in effect and the following leases have issued.

Serial No.	Issued	Lessee	Acreage
Wyoming—			
015395	7-1-61	Cities Service Petroleum Co.	640.00
0135400	3-1-62	Bridwell Oil Company	760.00
0266690	10-1-63	James R. Learned	160.00

/s/ Ed. Pierson

2. CORRESPONDENCE AND MEMORANDA OF THE DEPARTMENT OF THE INTERIOR AND THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES RELATING TO OIL AND GAS LEASING OF THE KENAI MOOSE RANGE.

**UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.**

August 31, 1953

Memorandum

To: Regional Administrators, Regions I to VII, inclusive; Managers, Land and Land and Survey Offices

From: Director, Bureau of Land Management

Subject: Oil and Gas Offers in Fish and Wildlife Refuges

A study is now being conducted by Assistant Secretary Lewis, and all the Bureaus involved, of a possible revision of policy and regulations in the issuance of oil and gas leases within wildlife refuges, both on the public domain and acquired lands. Pending the completion of this study and the possible revision of existing regulations, you will suspend action on all pending oil and gas lease offers and applications for lands within such refuges. Where an offer, or an application embraces land partly within and partly without a wildlife refuge, you will suspend action on the portion of the offer or application within the refuge and process, in the absence of any objections, the offer or application to lease as to the land without the refuge.

Action on pending appeals from rejection of such offers or applications will be suspended until the study is completed, a policy is established and the regulations revised in accordance therewith. Likewise, applications of this nature which have been held for rejection will also be suspended pending the completion of this study.

/s/WM. ZIMMERMAN, JR.
Acting Director

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

February 15, 1954

Memorandum

To: Assistant Secretary Lewis

From: Director

Subject: Oil and Gas Leasing for Wildlife Refuge Lands

The matter of establishing a new policy on the issuance of oil and gas leases for fish and wildlife refuge lands has been under consideration for some time and discussed at several meetings with you, with representatives of this office, the Fish and Wildlife Service, and the Geological Survey. The present policy on issuing leases for wildlife refuge lands is reflected in the existing regulation (43 CFR 192.9), which reads as follows:

"No noncompetitive oil and gas lease under the act will be issued for lands within a wildlife refuge (a) unless those lands are subjected to an approved cooperative or unit plan, and (b) unless the lease contains a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish and Wildlife Service. Subject to the same two conditions, competitive leases also may issue for refuge lands. Even if these conditions are not met, competitive leases may nevertheless issue if Fish and Wildlife Service reports that oil and gas development may be conducted without destroying the usefulness of the lands as a sanctuary for wildlife, or, in the absence of such a report, whenever the Secretary determines that the national interest in securing the contemplated oil and gas production

outweighs the importance of maintaining the refuge as a sanctuary for wildlife."

The suggested change in policy is to issue oil and gas leases with a stipulation that no drilling operations will be permitted (a) unless the lands are subjected to an approved cooperative or unit plan, and (b) except when consented to by the Secretary of the Interior, upon the advice of the Fish and Wildlife Service.

The question to be determined, therefore, is whether leases should issue prior to the approval of a cooperative or unit plan, or whether the approval of such a plan should be a condition precedent to the issuance of leases. To leave the regulations without change would practically mean, in most instances, that applications for oil and gas leases would be rejected, inasmuch as few lessees or operators would be able to submit a cooperative or unit plan for approval without having assurance of holding the necessary leases embracing lands logically subject to unitization. The question is one of policy, whether we wish to carry out the provisions of the Mineral Leasing Act to encourage the prospecting, development and production of oil and gas in all areas of our public lands, on the one hand, or whether we want to take every step to preserve our fish and wildlife land areas without interference from any other use of the lands. There are merits to both contentions. However, multiple use of lands without material interference for the purpose for which such lands are withdrawn or reserved is a major policy in the management of public lands. Moreover, it is essential to encourage private industry to ascertain where our oil reserves are and the Government to encourage private capital to test "wild-cat" areas in order that we may discover new sources of our oil and gas supply.

At the present time, action on oil and gas offers and applications are suspended by memorandum of August 31, 1953, so that the applicants may retain their priority of filing until a definite policy is established.

In view of this situation, it is recommended that:

(1) Regulations be amended to permit the issuance of oil and gas leases on wildlife refuge lands upon receipt of a report from the Fish and Wildlife Service that leasing will not materially interfere with the use of the land as a wildlife refuge, or be inconsistent with such use;

(2) That all such leases contain a stipulation that permission will not be granted to drill anywhere on the land embraced in the wildlife refuge unless (a) those lands are subjected to an approved cooperative or unit plan, (b) that such lease will contain a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish and Wildlife Service, and (c) that prior to the issuance of such a lease, the lessee will sign such other stipulations for the protection of the wildlife refuge lands as may be required by the Fish and Wildlife Service;

(3) That lands within a structure of a known oil and gas field, as defined by the Geological Survey, in wildlife refuge lands be offered for leasing by competitive bidding and contain such stipulations as the Fish and Wildlife Service may require for the protection of the wildlife refuge lands; and

(4) That offers and applications for leases and wildlife refuge lands shall be rejected upon receipt of an adverse report from the Fish and Wildlife Service that leasing would be inconsistent with the use of the land for wildlife purposes, notwithstanding any stipulations which may be made to protect such lands, and the rejection of such offers or applications shall be subject to the right of appeal to the Secretary of the Interior under existing Rules of Practice.

EDWARD WOOLEY

Director

August 12, 1955

Memorandum**To:** Area Administrator, Area 4**From:** Director, Bureau of Land Management**Subject:** Oil and Gas Applications in Moose Reserve

Reference is had to your memorandum of August 9 regarding the above subject. It appears that there are more than 300 applications for noncompetitive oil and gas leases for lands within a Moose Reserve on the Kenai Peninsula pending in the Anchorage office. The reserve was created by E.O. 8979 of Dec. 16, 1941, identified under Miscellaneous Number 1841730.

By memorandum of August 31, 1953, the Acting Director at the request of Assistant Secretary Lewis suspended action on all oil and gas lease applications and offers for lands within the wildlife refuges pending consideration of a possible revision of policy and regulations in the issuance of oil and gas leases within such refuges. This suspension applied to public domain as well as acquired lands. The Secretary has not as yet taken any action to revise the regulations, nor has he definitely determined not to revise same. Consequently, until such determination is made by the Secretary, the suspension memo of August 31, 1953 is still in effect, and such applications will remain in suspended status until otherwise notified by this office. This memorandum order does not prevent the filing of new offers for oil and gas leases in wildlife areas, but no action could be taken until the suspension order is removed.

Your attention is also called to the fact that there are existing regulations for issuing leases in wildlife refuges embodied in 43 CFR 192.9. The suspension was necessary in order that where compliance is not made therewith applicants for oil and gas leases will preserve their priority (see Circular 1984). Where applicants for oil and gas leases

18A

comply with 192.9 and our attention is called to it, we remove the suspension order as to such case and direct the issuance of leases in the absence of other objections.

/s/ L. E. HOFFMAN

For the Director

HOUSE OF REPRESENTATIVES, U. S.
COMMITTEE ON MERCHANT MARINE AND FISHERIES
ROOM 219, HOUSE OFFICE BUILDING
WASHINGTON 25, D. C.

MARCH 21, 1956.

HON. DOUGLAS MCKAY,
Secretary of the Interior,
Department of the Interior, Washington 25, D. C.

DEAR MR. SECRETARY: As you are aware, the committee has recently concluded hearings on H. R. 5306 and H. R. 6723, bills designed primarily to protect and preserve the national wildlife refuges. Representatives from your Department appeared and testified. It was evident from the testimony that some degree of control on the part of Congress properly should be exercised over changes in wildlife refuges which lessen their value for the conservation of wildlife. However, under the bills referred to above, specific legislation would have to be enacted in each individual case. This strikes me as too cumbersome a procedure.

In lieu of the requirements set forth in these bills, I suggest an arrangement whereby the Secretary of Interior would submit to the committee each proposed disposal of any interest which Fish and Wildlife Service has in any lands under its jurisdiction. Such submission would be accompanied by a full statement of the reasons for the change in status and a statement of any known or anticipated opposition thereto. Within 60 days, the committee would either come to agreement with your Department on the matter or give notice of its disapproval.

Such an arrangement would cover the alienation or relinquishment of any interest in such lands, or the grant of privileges in connection therewith, that do not have for their purpose the development and use of such lands for wildlife conservation. The agreement would not cover privileges related to recreational sites (concessions, etc.), rights-of-

—way for telephone, telegraph, and powerlines, and similar minor uses. In the case of rights-of-way for Federal aid highways, it is understood that your Department frequently is unable to give 60 days' advance notice; in those cases, it will suffice if you would give the committee as much advance notice as is possible within the limits of the time available to the Department for approval or rejection of the application for Federal aid for such highway development.

This suggested arrangement would be put into effect immediately and would be operative as an experiment pending the development of experience upon which to base its sufficiency.

I should appreciate your reaction to this proposal as soon as possible.

Sincerely,

HERBERT C. BONNER, *Chairman.*

UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D. C.

March 21, 1956

HON. HERBERT C. BONNER,
*Chairman, Committee on Merchant Marine
and Fisheries.*
House of Representatives, Washington 25, D. C.

MY DEAR MR. BONNER: Your letter of March 21 refers to the recent hearings on H. R. 5306 and H. R. 6723, entitled bills "To protect and preserve the national wildlife refuges" administered by this Department. You suggest that the procedures under these bills with respect to the disposition of wildlife interests is too cumbersome and I agree.

Your letter then outlines an arrangement whereby each proposed disposal of any interest which the Fish and Wildlife Service has in any lands under its jurisdiction would be submitted to the committee together with a statement of the reasons for the proposed change in status and other material facts. Within 60 days after such submittal, the committee would either come to agreement with the Department on the matter or give notice of its disapproval. You also point out specifically what the arrangement is intended to cover.

Any arrangement which results in keeping the Congress currently advised of the activities, functions, and duties of this Department should prove to be of considerable benefit both to the Congress and to this Department. Thus, I am glad to agree to the suggestions as outlined in your letter.

Sincerely yours,

DOUGLAS MCKAY,
Secretary of the Interior.

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILD LIFE SERVICE

June 29, 1956

HON. HERBERT C. BONNER, *Chairman*
Committee on Merchant Marine and Fisheries
House of Representatives
WASHINGTON, 25, D. C.

MY DEAR MR. BONNER:

In accordance with the agreement expressed in the communications between you and the Secretary of the Interior on March 21, we are referring for your attention proposals for the development of oil and gas resources involving lands of the Kenai National Moose Range in Alaska.

The first proposal is for the establishment of a unit area and the issuance of oil and gas leases on 71,680 acres of the Moose Range. The second proposal involves the possible issuance of leases on that part of the Kenai Peninsula Development Area established by development contract between the Secretary of the Interior and the Standard Oil Company of California, lying within the Kenai National Moose Range and involving about 165,000 acres of the Range.

The Moose Range of 2,057,197 acres of reserved public land is located on the Kenai Peninsula, about 25 miles southwest of Anchorage and 13 miles northwest of Seward and was established by Executive Order No. 8979 of December 16, 1941. The proposed Swanson River Unit Area in the northwest part of the Range and the Kenai Peninsula Development Area are shown on the enclosed map.

The Fish and Wildlife Service believes that the orderly development of oil and gas resources under such provisions as are needed for the protection of the lakes and streams and related fish and wildlife values will not lessen the value of the Range for the conservation of wildlife. Recent dis-

cussions with lease applicants indicate that this Service and the oil companies are in general agreement as to the safeguards which should apply in this instance. The proposed unit or cooperative agreement already executed by the Richfield Oil Corporation, the Ohio Oil Company, and the Union Oil Company of California, will provide that no operations will be conducted on lands of the Moose Range without prior approval of the Fish and Wildlife Service. The development contract with the Standard Oil Company of California also provides that no operations will be conducted on lands of the Kenai Moose Range without prior approval of the Fish and Wildlife Service.

Delegate E. L. Bartlett of Alaska has indicated his concurrence with the proposal to issue oil and gas leases on the 71,680 acres in the proposed unit area.

Sincerely yours,

JOHN L. FARLEY
Director

HOUSE OF REPRESENTATIVES, U. S.
COMMITTEE ON MERCHANT MARINE AND FISHERIES
ROOM 219, HOUSE OFFICE BUILDING
WASHINGTON 25, D. C.

July 3, 1956

MR. JOHN L. FARLEY, *Director*
Fish and Wildlife Service
Department of the Interior
Washington 25, D. C.

Re: Kenai National Moose
Range, Alaska

DEAR MR. FARLEY:

This will acknowledge receipt of your letter of June 29, 1956 advising me of the proposals to issue oil and gas leases on the above moose range.

This matter has been referred to the members of the Merchant Marine and Fisheries Committee and other interested persons and I will advise you further as soon as their replies are received.

Sincerely,

HERBERT C. BONNER
Chairman

25A

HOUSE OF REPRESENTATIVES, U. S.
COMMITTEE ON MERCHANT MARINE AND FISHERIES
WASHINGTON 25, D. C.

July 25, 1956

MR. JOHN L. FARLEY, *Director*
Fish and Wildlife Service
Department of the Interior
Washington 25, D. C.

Re: Kenai National Moose
Range, Alaska.

*DEAR MR. FARLEY:

As you are no doubt aware, the Committee held public hearings on the proposed issuance of oil and gas leases on the above moose range. The only opposition expressed was based upon the principle of maintaining the range inviolate. Mr. Bartlett, the delegate from Alaska, joined with representatives of your department in testifying that there would be no detriment to the wildlife values in the area. After considering the matter, the members of the Committee on Merchant Marine and Fisheries were unanimous in the view that the proposal will not prove detrimental. Accordingly, I, and the Committee, concur in the judgment of the Fish and Wildlife Service with reference to the issuance of the leases.

Sincerely,

HERBERT C. BONNER
Chairman

THE SECRETARY OF THE INTERIOR
WASHINGTON

May 1, 1958

DEAR MR. BONNER:

This will refer to our meeting of this morning and the discussion concerning the oil and gas leasing on federal wildlife lands.

On March 21, 1956, Douglas McKay, then Secretary of the Interior, directed a letter to you with reference to recent hearings on H. R. 5806 and H. R. 6723, entitled "To protect and preserve the national wildlife refuges." In that letter it was suggested that in the event of any leasing on lands under the jurisdiction of the Fish and Wildlife Service, the matter should be brought to the attention of the Committee through the Chairman of the Merchant Marine and Fisheries Committee, in which event a decision would be reached within sixty days.

In view of the new regulations and stipulations which now are in effect with regard to oil and gas leasing on such lands, it would appear that there was no longer a necessity for this procedure and we would respectfully suggest that in the future such notice not be necessary. However, in any case where a proposal to grant a lease or to exchange land or right of way results in substantial controversy, we would deem it desirable to inform you of any action we may take in the matter.

Sincerely yours,

ROSS LEFFLER
Assistant Secretary

Hon. Herbert C. Bonner
Chairman, Committee on
Merchant Marine and Fisheries
House of Representatives
Washington 25, D. C.

27A

HOUSE OF REPRESENTATIVES, U. S.
COMMITTEE ON MERCHANT MARINE AND FISHERIES
ROOM 219, HOUSE OFFICE BUILDING

May 2, 1958

HONORABLE ROSS LEFFLER
Assistant Secretary of the Interior
Washington 25, D. C.

DEAR MR. LEFFLER:

This will acknowledge receipt of your letter of May 1, 1958, regarding our discussion of the new regulations and stipulations in effect with regard to oil and gas leasing on lands under the jurisdiction of the Fish and Wildlife Service.

I agree that there presently appears to be no necessity for the continuation of the procedure established between secretary McKay and the Committee on Merchant Marine and Fisheries by letter dated March 21, 1956.

However, I would appreciate being kept informed of transfers of interests in wildlife lands which, either because of their magnitude or controversial nature, are likely to be of interest to the Committee.

Sincerely,

HERBERT C. BONNER
Chairman

LIBRARY

U. S. DISTRICT COURT, U. S.

No. 34

Michael J. Uhl, Secretary of the Interior,
Petitioner,

vs.
James K. Thompson, et al.,
Respondents.

As Granted by the United States Court of Appeals
for the District of Columbia.

ORDER OF THE UNITED STATES COURT OF APPEALS
ON PETITION OF PETITIONER AND STANDARD
OIL COMPANY OF CALIFORNIA FOR LEAVE TO
FILE BRIEF AS AMICI CURIAE

AND

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

Ann Furman,
1201 16th Street, N.W.,
Washington, D.C.

Joseph A. Ball,
1201 16th Street,
Long Beach, California.

Conrad A. Goodwin,
1201 16th Street,
Los Angeles, California.

Attorneys for Richfield
Oil Corporation.

Francis R. Kirkham,
Turner H. McRae,
1201 16th Street,
San Francisco, California.

Clark M. Clifford,
1201 16th Street, N.W.,
Washington, D.C.

Attorneys for Standard Oil
Company of California.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Petitioner,

VS.

JAMES K. TALLMAN, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Richfield Oil Corporation and Standard Oil Company of California respectfully move this Court for leave to file, as amici curiae, the attached brief in support of the petitioner. Consent to the filing of said brief has been given by petitioner, but respondents have refused their consent.

Leave is requested on the following grounds:

I

This Court granted applicants' motion for leave to file an *amicus curiae* brief in support of the petition for certiorari, and applicants filed such a brief.

II

Applicants hold oil and gas leases issued by the petitioner covering most of the lands in the Kenai National Moose Range on which respondents seek leases from petitioner. Applicants also hold most of the oil and gas leases on lands in the Kenai National Moose Range which produce or are known to be capable of producing oil in commercial quantities. In addition, applicants hold many other oil and gas leases on lands in the Kenai National Moose Range which remain to be explored for oil and gas.

Prior to the decision of the Court of Appeals, applicants had spent over \$45,000,000 in the development of the oil and gas deposits in Kenai National Moose Range, had produced over 23,000,000 barrels of oil, and had paid to the United States royalties exceeding \$8,000,000. The State of Alaska has received 90 per cent of these royalties—a vital part of its revenues.

III

Applicants have an intimate knowledge of the long and complicated factual history giving rise to the issues in this case. They believe they can materially aid this Court by presenting facts and reasons which demonstrate that the petitioner's construction of the orders relating to

the Kenai National Moose Range as leaving the Range open to oil and gas leasing is clearly correct, and which demonstrate that, prior to the time respondents filed their applications for leases in the Range, Congress and the President had adopted and ratified petitioner's construction of those orders. Each of these issues is conclusive against the claims of respondents and requires a reversal of the decision of the Court of Appeals.

For the reasons stated, applicants respectfully request leave to file the attached brief in support of the petitioner.

Dated: August 25, 1964.

Respectfully submitted,

ABE FORTAS,

JOSEPH A. BALL,

GORDON A. GOODWIN,

*Attorneys for Richfield
Oil Corporation.*

FRANCIS R. KIRKHAM,

TURNER H. MCBAIN,

CLARK M. CLIFFORD,

*Attorneys for Standard Oil
Company of California.*

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Petitioner,

VS.

JAMES K. TALLMAN, ET AL.,
Respondents.

On Certiorari to the United States Court of Appeals
for the District of Columbia

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

INDEX

	Page
Interest of Amici Curiae	1
Chronology of main events	2
Summary of argument	18
Argument	
I. Neither Executive Order 8979 nor Public Land Order 487 closed the lands within the Moose Range to oil and gas leasing	19
II. The Secretary's construction of Executive Order 8979 and Public Land Order 487 as leaving the Moose Range open to leasing has been uniform and consistent over a long period of time, and should not be disturbed	29
III. The Secretary's construction of the orders creating and governing the Moose Range has been ratified and confirmed by Congress and the President	39
IV. Indispensable parties were not joined in this suit	48
Conclusion	53
Appendix	
Moose Range applications filed by Respondents during unacceptable filing period and during simultaneous filing period	i
Letter dated June 13, 1958, from Assistant Secretary of the Interior Roger Ernst to Respondent Bailey E. Bell	ii
Letter dated July 24, 1956, from Deputy Solicitor Edmund T. Fritz to Hon. E. L. Bartlett	iv

CITATIONS

Cases	Pages
Alaska Freight Lines v. Weeks, 18 F.R.D. 64.....	52
Barash v. Seaton, 256 F.2d 714; 66 I.D. 12.....	49
Brady v. Work, 263 U.S. 435.....	51
Brooks v. Dewar, 313 U.S. 354.....	46
Brown v. Christman, 126 F.2d 625, 631-632	48
Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216.....	52
Dunn v. Ickes, 115 F.2d 36.....	2
F.T.C. v. Mandel Brothers, 359 U.S. 385.....	39
Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111	46
Flynn v. Brooks, 105 F.2d 766, 767-768.....	48
Haley v. Seaton, 281 F.2d 620.....	2
Hooey v. Wilson (1870) 9 Wall. (76 U.S.) 501.....	48
Hynes v. Grimes Packing Co., 337 U.S. 86.....	26
Ickes v. Development Corp., 295 U.S. 639.....	30
Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275.....	46
Kake Village v. Egan, 369 U.S. 60.....	27
Litchfield v. Register and Receiver, 9 Wall. (76 U.S.) 575..	51
Lucas v. American Code Co., 280 U.S. 445.....	39
Mason v. United States, 260 U.S. 545.....	23, 25
Okanogan Indians v. United States, 279 U.S. 655.....	39
Peters v. Hobby, 349 U.S. 331.....	48
Power Reactor Co. v. Electricians, 367 U.S. 396.....	39, 46
Shields et al. v. Barrow, 17 How. (58 U.S.) 129.....	50
Stroud v. Benson, 254 F.2d 448, cert. den. (1958) 358 U.S. 817	52
Texas v. Interstate Com. Comm. (1922) 258 U.S. 158.....	52

	Pages
United States v. Midwest Oil Co., 236 U.S. 459.....	41
United States ex rel. McLennan v. Wilbur, 283 U.S. 414....	2, 7
Universal Battery Co. v. United States, 281 U.S. 580	39
Work v. Louisiana, 269 U.S. 250.....	50

Decisions of the Department of the Interior

James C. Forsling, 56 I.D. 281.....	16
Paul Gordon, Amerada Petroleum Corporation, 70 I.D. 255	33
D. Miller, 60 I.D. 161.....	34
Opinion of the Solicitor, 48 I.D. 459.....	21, 30, 32
Opinion of the Solicitor, 55 I.D. 205.....	32
Opinion of the Solicitor, 57 I.D. 461.....	28
Opinion of the Solicitor, 58 I.D. 1.....	26, 27
Noel Teuscher, 62 I.D. 210.....	33, 34
Richard K. Todd, 68 I.D. 291.....	11, 15, 38

Opinions of Attorney General

Opinion of the Attorney General, 40 Ops.Atty.Gen. 175	26
Opinion of the Attorney General, 40 Ops.Atty.Gen. 73	3

Statutes

Alaska Fisheries Act of 1924, 43 Stat. 464	26
Alaska Submerged Lands Act of July 3, 1958, 72 Stat. 322,	
30 U.S.C. 251;	14, 44
Sec. 3;	44
Sec. 10;	45
Federal Power Act of June 10, 1920, 41 Stat. 1063	30
Mineral Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. 181,	
et seq.;	1, 2, 30
Sec. 17 (30 U.S.C. 226)	1
30 U.S.C. 226(c)	3
30 U.S.C. 226-1	38

	Pages
Pickett Act of 1910, 37 Stat. 847, 43 U.S.C. 141	3, 5
Placer Mining Law, 17 Stat. 91; 29 Stat. 526; 38 Stat. 609	29
Public Law 171 of 1906, 34 Stat. 197	21, 22
Public Law 679 of 1929, 45 Stat. 1091	21, 22
26 Stat. 1099	22
38 Stat. 509	30
39 Stat. 862	30
54 Stat. 1192	23
61 Stat. 913	41
68 Stat. 708	41
76 Stat. 744	52
28 U.S.C. 1391	52
48 U.S.C. 64	47

Executive and Public Land Orders

Executive Order No. 8979, 6 F.R. 6471	3, 19, 20, 24, 34
Executive Order No. 9146, 7 F.R. 3067	4
Executive Order No. 9337, 8 F.R. 5516	4
Executive Order No. 10355, 17 F.R. 4831	4
Public Land Order No. 487, 13 F.R. 3462	5, 20, 28, 34
Public Land Order No. 751, 16 F.R. 9044	6, 34
Public Land Order No. 778, 17 F.R. 159	6, 34
Public Land Order No. 1212, 20 F.R. 6795; as amended, 20 F.R. 7904	9, 10

Regulations and Public Notices

43 C.F.R. 192.9; 12 F.R. 7334	5
43 C.F.R. 192.9; 20 F.R. 9009	10, 11
43 C.F.R. 192.9; 23 F.R. 227	12
43 C.F.R. 192.9(b)(2)	13

CITATIONS

	Pages
43 C.F.R. 295.8	15
43 C.F.R. 3100 et seq.	2
Notice, Secretary of Interior, Aug. 2, 1958, 23 F.R. 5883 ..	14

Congressional References

Cong. Rec. Jan. 9, 1956, p. 220	11
Cong. Rec. Feb. 2, 1956, p. 1929	41
1956 Cong. Rec., Appendix, p. A 6581	7, 8
Hearing, House Committee on Merchant Marine & Fisheries, July 20, 1956	42
Hearing before House Committee on Merchant Marine & Fisheries, 84 Cong., 2d Sess., on H.R. 5306, etc.....	8, 40
Hearing before Senate Committee on Interior & Insular Affairs, 85th Cong., 2d Sess., on H.R. 8054	14, 43
Hearing before Sub-Committee on Merchant Marine & Fish- eries of Senate Committee on Interstate & Foreign Com- merce, 84th Cong., 2d Sess., on S. 2101	8, 40
House Report No. 2379, 76th Cong., "Investigation of the Fisheries of Alaska"	28
House Report No. 1941, 84th Cong., 2d Sess.	12, 41
House Report No. 2511, 82d Cong., 2d Sess.	41
Senate Report No. 1549 of June 10, 1960, on H.R. 10455, 86th Cong., 2d Sess.	33
Senate Report No. 1720, 85th Cong., 2d Sess.	44

Miscellaneous

50 Am.Jur. 261	25
57 Am.Jur. 750	24
Annual Report, Governor of Alaska, fiscal year ended June 30, 1955	36, 47
Annual Report, Governor of Alaska, fiscal year ended June 30, 1957	47

	Pages
Annual Report, Secretary of Interior, fiscal year ended June 30, 1952	31
Annual Report, Secretary of Interior, fiscal year ended June 30, 1953	46
Annual Report, Secretary of Interior, fiscal year ended June 30, 1957	12
BLM Memorandum to Area Administrators, Aug. 31, 1953	6
BLM Memorandum to Asst. Secretary of Interior Lewis, Feb. 15, 1954	7
BLM Memorandum to Area Administrator, Area 4, Aug. 12, 1955	7, 8
BLM Memorandum dated March 30, 1956	11
Hoffman, Oil and Gas Leasing on the Public Domain (1951) 33-34	34
Interior Dept. Press Release No. 93809 (1956)	9
Interior Dept. Press Release of July 25, 1958	15
Letter from Asst. Secretary of Interior Ernst to Respondent Bailey E. Bell, dated June 13, 1958	16
Memorandum from Solicitor, Dept. of Interior, to Under Secretary Davis, May 30, 1956	37
2 Sutherland on Statutory Construction (3d Ed.)	
339;	25
395;	21

INTEREST OF AMICI CURIAE

Late in 1954 and early in 1955, a number of individuals filed applications for oil and gas leases on lands lying within the Kenai National Moose Range on the Kenai Peninsula in Alaska (R. 38). On August 14, 1958, some of the respondents filed offers to lease the same lands. Acting pursuant to section 17 of the Mineral Leasing Act of 1920 (41 Stat. 437, 30 U.S.C. 181, et seq.), which requires leases on lands not within a known geologic structure to be issued to "the person first making application" therefor, the Interior Department issued leases, effective September 1, 1958, pursuant to the applications filed in 1954 and 1955 (R. 38). In October, 1959, when respondents' applications were reached for processing, they were rejected on the ground that leases had been issued to prior applicants (R. 38). The Court of Appeals, in the decision below, reversed this action and ordered leases issued to respondents.

Amici curiae Richfield Oil Corporation and Standard Oil Company of California hold operating agreements covering the above-mentioned leases issued effective September 1, 1958.

The validity of these leases, and of the rejection of respondents' later applications, can best be understood in the light of the history of the Kenai Moose Range and the various regulations and orders pertaining thereto.

CHRONOLOGY OF MAIN EVENTS

Under the Mineral Leasing Act of 1920 (41 Stat. 437, 30 U.S.C. 181, et seq.), the Secretary of the Interior was authorized to issue to the first qualified applicants therefor, oil and gas leases on public lands not within any known geologic structure of a producing oil and gas field. The Act excluded from its application certain designated lands, but did not exclude lands within wildlife refuge areas. The Secretary is not *required* by the Act to issue a lease to the first qualified applicant; the statute means merely that if the Secretary, in his discretion, decides to lease particular lands, he must lease them to the first qualified applicants; the first qualified applicant obtains only a priority or a preference right to a lease as against other applicants (see *United States ex rel McLennan v. Wilbur* (1931) 283 U.S. 414; *Haley v. Seaton* (1960) 281 F.2d 620, 625).¹

Since the Secretary has discretion as to whether to issue a lease or not, whenever an application is filed he may, instead of rejecting it outright, accept it, accord it priority as against other applicants, and suspend action upon it for a reasonable period in order to decide how to exercise his discretion. As the Court said in *Dunn v. Ickes* (D.C. Cir. 1940) 115 F.2d 36, at 37, "It cannot be doubted that under many circumstances withholding action on such applications for a rather extended period would be eminently proper, if not essential to wise administration."

¹The regulations under which the Secretary will issue non-competitive leases are set forth in 43 C.F.R. 3100, et seq. Prior to the April 1, 1964 revision of Title 43, the regulations were in Part 192 thereof.

A suspension does not relieve the Secretary of his statutory duty to issue a lease to "the person first making application for the lease" (49 Stat. 677, 30 U.S.C. 226(c)) in the event he should exercise his discretion in favor of leasing.

Creation of the Kenai Moose Range

On December 16, 1941, by Executive Order No. 8979, and acting "by virtue of the authority vested in me as President of the United States," the President withdrew and reserved some two million acres of land and water on the Kenai Peninsula in Alaska for use "as a refuge and breeding ground for moose" (6 F.R. 6471).² The order provided that:

"None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10 and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an ade-

²The withdrawal, not being a temporary one for public purposes, was not made under the Pickett Act of 1910 (36 Stat. 847, 43 U.S.C. 141-3; see 40 Ops. Atty-Gen. 73 (June 4, 1941)), but was made under the inherent power of the President.

quate system for grazing livestock thereon', 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: *Provided, however*, That as to the foregoing excepted lands, primary jurisdiction shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: *Provided further*, That the lands in the said excepted areas shall be classified by the General Land Office, Department of the Interior, and those lands classified as not suitable for settlement shall no longer be available for that purpose:"

A few months after the Range was created, the President delegated to the Secretary of the Interior the authority to sign all orders withdrawing or reserving public lands, or revoking or modifying such orders, and the Secretary has had this authority ever since that time.^{2a}

From this time forward, therefore, the Secretary had delegated authority from the President to withdraw lands, or to revoke or modify a withdrawal, and in so doing, to close the lands to leasing, or to open them or leave them open to leasing; and, as to lands open to leasing he had discretionary authority to refuse to issue leases, and accordingly discretionary authority to reject applications for such leases, as well as discretionary authority to accept applications and accord them priority, but suspend action upon them until he had decided how to exercise his discretion.

^{2a}See Executive Order 9146 of April 24, 1942 (7 F.R. 3067; Executive Order 9337 of April 24, 1943 (8 F.R. 5516); Executive Order 10355 of May 28, 1952 (17 F.R. 4831)..

On June 16, 1948, exercising the authority delegated to him by the President, the Secretary signed Public Land Order 487 (13 F.R. 3462), withdrawing most of the lands excepted from the original Moose Range order

"from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation."³

Initial Wildlife Refuge Regulation

On November 8, 1947, the Secretary of the Interior promulgated the first general regulation dealing with the issuance of oil and gas leases within wildlife refuges (43 C.F.R. 192.9; 12 F.R. 7334). The Kenai Moose Range was, of course, a wildlife refuge. The 1947 regulation provided in part that: "No noncompetitive oil and gas leases * * * will be issued for lands within a wildlife refuge (a) unless those lands are subjected to an approved cooperative or unit plan, and (b) unless the lease contains a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish & Wildlife Service."

This initial regulation clearly contemplated that non-competitive oil and gas leases could and would be issued on wildlife refuge lands if the stated conditions were met.

Specific Withdrawals from Mineral Leasing

Neither E.O. 8979 nor P.L.O. 487 expressly withdrew any lands within the Kenai Moose Range from oil and gas leasing. In 1951, however, minor portions of the lands

³This withdrawal was made under the Pickett Act of 1910 (36 Stat. 847, 43 U.S.C. 141-143).

within the Range were set aside for uses inconsistent with mineral leasing, and accordingly *were* withdrawn from leasing under the mineral leasing laws in Public Land Orders issued by the Secretary which provided that

“the following described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public-land laws, *including the mining laws and the mineral-leasing laws*” (italics added).⁴

It was perfectly clear up to this point, therefore, and clear on the official record from the actions of the Secretary that the bulk of the lands within the Moose Range was open to oil and gas leasing.

Oil and Gas Leasing in the Moose Range Up to 1955

On May 21, 1953, the first application for an oil and gas lease covering lands lying within the Moose Range was filed in the Anchorage Land Office in Alaska.⁵ The application was accepted, and placed in order for processing.

By an intra-agency memorandum dated August 31, 1953, the Director of the Bureau of Land Management advised the Regional Administrators of the Bureau and the Managers of the local Land Offices that “a possible revision of policy and regulations” on leasing in wildlife refuges throughout the country was being studied (See

⁴See Public Land Order 751 of August 29, 1951 (16 F.R. 9044), which withdrew 160 acres for the Civil Aeronautics Administration, and 88.86 acres for town-site purposes, and Public Land Order 778 of December 29, 1951 (17 F.R. 159), which withdrew a number of tracts within the Range, aggregating 4280 acres, for the use of the Army.

⁵See *infra*, p. 35.

Appendix, Brief of Amici Marathon Oil Company and Union Oil Company of California). Exercising on behalf of the Secretary the discretionary authority referred to above, supra, p. 2, he directed the local offices that "Pending the completion of this study and the possible revision of existing regulations, you will suspend action on all pending oil and gas lease offers and applications for lands within such refuges." In a subsequent memorandum⁶ the Director said that this suspension was "so that the applicants may retain their priority of filing until a definite policy is established."

No instructions were given in the memorandum of August, 1953, not to receive new applications for leases within wildlife refuges, and a Bureau of Land Management memorandum to the Area Administrator, Area 4 (Alaska), dated August 12, 1955 (infra, footnote 9), referring particularly to the Kenai Moose Range, explicitly stated that the 1953 order "does not prevent the filing of new offers for oil and gas leases in wildlife area", and that "applicants for oil and gas leases will preserve their priority."⁸

⁶Memorandum from Director of Bureau of Land Management to Assistant Secretary of Interior Lewis dated Feb. 15, 1954.

⁷In an extension of remarks in the House of Representatives dated July 27, 1956; Representative Clare E. Hoffman of Michigan said (1956 Cong.Rec., Appendix, p. A. 6581, at A. 6582), "The pending applications were suspended, rather than canceled, to avoid inflicting an undeserved penalty on the applicants by depriving them of their filing priority, because of the shortcomings of the Government's regulations." By "shortcomings" Mr. Hoffman meant the alleged inadequacy of the 1947 regulations to protect wildlife areas.

⁸Thus, the instructions here involved are entirely different from those considered in *United States v. Wilbur* (1931) 283 U.S. 414, where the local offices were expressly instructed to reject

The "suspension order" of August 31, 1953, was given by an internal memorandum, never published in the Federal Register, and amounted simply to instructions by the Director to local subordinates on the course to be followed by them pending further advice from headquarters. It did not prevent the issuance of leases within the discretion of the Director,⁹ and a lease on the application of May 21, 1953, referred to above, and leases on applications in a number of different refuges (including the Moose Range) were in fact issued during the so-called "suspension" period.¹⁰

During the latter part of 1954 and the early months of 1955, interest in the oil and gas prospects of the Kenai Peninsula increased, and a number of individuals—mainly residents of Anchorage, Alaska—filed applications for leases in the northern half of the Moose Range. Among these were applications covering all of the lands upon which Respondents filed lease offers almost four years

pending applications and not to accept new applications for filing in order that the publicly announced policy of conserving oil in the ground could be carried out.

⁹In a memorandum from the Director of the Bureau of Land Management to the Area Administrator, Area 4 (Alaska), dated August 12, 1955, the Director stated,

"Your attention is also called to the fact that there are existing regulations for issuing leases in wildlife refuges embodied in 43 C.F.R. 192.9. * * * Where applicants for oil and gas leases comply with 192.9 and our attention is called to it, we remove the suspension order as to such case and direct the issuance of leases in the absence of other objections."

¹⁰Hearing before the Sub-committee on Merchant Marine & Fisheries of the Senate Committee for Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92-93; Hearings before the House Committee on Merchant Marine & Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., pp. 142-146; 102 Cong. Rec. A. 6581-A. 6583.

later, the rejection of which led to this lawsuit. Again, the applications filed during this period were accepted and action on most of them was suspended in accordance with the 1953 instructions, each application receiving priority according to the date of its filing. None was rejected on the ground that the Moose Range was closed to leasing.

1955-1956

A few of the applications for oil and gas leases in the Moose Range filed during 1954 and 1955 were granted promptly after filing.¹¹ The bulk of them, because of the suspension order of August, 1953, and subsequent instructions from the Bureau of Land Management, were simply suspended pending possible revision of the existing wildlife refuge leasing regulations, and given priority as of the date of filing.

On September 9, 1955, the Secretary issued a new land order, P.L.O. 1212 (20 F.R. 6795), revoking in its entirety P.L.O. 487, which had been partially revoked by previous land orders. As to the bulk of the lands covered thereby, P.L.O. 1212 provided that after a time the land should become subject to appropriation by veterans and others entitled to a preference, for a preliminary period, and after that "shall become subject to . . . appropriation by the public generally as may be authorized by the public-land laws, including the mineral leasing laws." A few

¹¹In Interior Department Press Release No. 93809, issued early in 1956, the Department said that during the suspension directed by the memorandum of August 31, 1953, "no leasing [in wildlife refuges] was permitted except in cases where it was necessary for the Government to protect itself from oil drainage or where possible damage to wildlife values was not involved."

weeks later, P.L.O. 1212 was amended by deleting the reference to the mineral leasing laws (20 F.R. 7904).¹²

On December 8, 1955, the anticipated revision of the refuge-leasing regulation was promulgated (20 F.R. 9009). The new regulation was much more restrictive than the old one, and gave increased power to the Fish & Wildlife Service to approve or disapprove oil and gas development of refuges. It listed in an Appendix A a number of refuges (not including Kenai) in which no leasing at all would be permitted because of their importance to the preservation of rare species of plant and animal life. It then listed in Appendix B certain areas (including a small part of the Moose Range not involved here) in which the Fish & Wildlife Service had determined that leasing, unless closely regulated, would jeopardize conservation purposes. In such areas leasing was to be permitted only upon the approval by the Director of the Fish & Wildlife Service "of a complete and detailed operating program for the area." In all other wildlife areas the regulation provided that "oil and gas leases may be issued" provided they contain specified conditions requiring approval

¹²The reference to the mineral leasing laws in the original text was certainly never intended to open the lands up to leasing for the first time since the promulgation of P.L.O. 487 in 1948, as is shown by the Secretary's repeated acceptance of applications for leases on the lands covered by P.L.O. 487 during its existence, including those applications which led to the leases held by amici Marathon and Union on the lands applied for by the respondent Coyle (see *infra*, pp. 35, 36). Of the lands involved in this litigation only those covered by the Coyle application lie within the area affected by P.L.O. 1212.

by the Fish & Wildlife Service of the type of prospecting conducted, and adoption by the lessees of a unit plan approved by the Service.

By expressly including a part of the Moose Range in Appendix B, the 1955 regulation necessarily included the rest of the Moose Range in the residual areas within which oil and gas leases could be issued. It thereby confirmed the pre-existing availability of the entire Moose Range for leasing under E.O. 8979 and P.L.O. 487.

The 1955 regulation had the effect of terminating the August 1953 "suspension" of leasing by local land offices. However, at the request of the Fish & Wildlife Service the suspension was almost immediately reinstated as to all refuges not listed in Appendices A and B of the new regulation. Upon the introduction in Congress of bills further to restrict leasing in wildlife refuges,¹³ the Interior Department's study of refuge leasing policy was resumed, and the Bureau of Land Management field offices were again directed to suspend action on lease applications in all refuges. Short-term suspensions were first directed, which were later made indefinite.¹⁴ A March 30, 1956 order from the Bureau of Land Management directed that the suspension should be continued until further notice, explaining that "this does not suspend all preliminary action which should continue to be taken. The suspension applies only to final action in such matters."

¹³See hearings referred to in footnote 10, *supra*.

¹⁴Cong. Rec., January 9, 1956, p. 220; 68 I.D. 298.

Once again, of course, the "suspensions" consisted simply of operating instructions from the Bureau of Land Management to subordinate offices, and with appropriate internal and sometimes Congressional approval¹⁵ a significant number of leases on refuge lands continued to be issued where this could be done without prejudice to wildlife values. Thus, in 1956 and 1957 thirty-one leases were issued on lands within the Moose Range withdrawn by E.O. 8979, twenty-six to amicus Richfield Oil Corporation and five to various individuals, which were subsequently placed in the Swanson River Unit.

1957

In July, 1957, oil was discovered in the Moose Range by amicus curiae Richfield Oil Corporation on one of the Swanson River Unit leases issued in 1956. In his annual report to the President for the fiscal year ended June 30, 1957, the Secretary of the Interior said,

"Shortly after the close of the fiscal year the Richfield Corp. brought in a well on the Kenai Peninsula. The resulting boom in oil leases saw nearly three-quarters of a million acres filed on in a single day. There is no doubt that a confirmed oil strike in Alaska will mean a tremendous stimulus to the Territory's economic growth."

1958

The final result of the discussion and study of the leasing policies to be followed in wildlife refuges was the adoption on January 8, 1958, of a second complete revision of the regulations (23 F.R. 227). The new regulation

¹⁵H.R. No. 1941, 84th Cong., 2d Sess., pp. 12-13; *infra* p. 41.

prohibited oil and gas leasing in many wildlife areas altogether,¹⁶ conferring on the Fish & Wildlife Service sole and complete jurisdiction over these areas. As to "game range lands" and "Alaska wildlife areas," the Bureau of Land Management and the Fish & Wildlife Service were to reach agreements specifying the lands which "shall not be subject to oil and gas leasing" (emphasis supplied) and the provisions required to be included in leases issued on the remaining lands. The agreements were to become effective upon approval by the Secretary and publication in the Federal Register. The regulation further provided that "all pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to . . . shall have been completed," and that no new lease applications would "be accepted for filing until the tenth day after the agreements . . . are noted on the land office records."¹⁷

¹⁶Unless leasing was necessary to prevent drainage (43 C.F.R. 3120.3-3(b)(2), formerly sec. 192.9(b)(2)).

¹⁷The period from January 8, 1958, until the tenth day after notation on the Land Office records of the agreement between the Bureau of Land Management and the Fish & Wildlife Service relating to the Moose Range (which was August 4, 1958, see *infra* p. 16), was therefore the only period from 1941 to the present time when all of the Range was closed to oil and gas lease applications.

Despite the clear admonition in the January, 1958 regulation that no new lease applications would be accepted during this period, all of the respondents, except Alice P. Tallman and Waldo E. Coyle, filed applications for oil and gas leases in the Moose Range on the lands involved in this suit during April and May 1958 (see Appendix p. i). These applications were, of course, rejected and the rentals proffered by applicants returned to them. On August 14, 1958, respondents refiled these offers, and it was the rejection of these offers as not being the first qualified applications which led to this lawsuit.

Meanwhile, the discovery of oil on the Moose Range had brought into sharp focus a serious title defect in the oil and gas leases issued on the public domain in Alaska. This defect arose from the fact that while the Secretary was authorized to issue leases on the public domain, he had ruled that he did not have the authority to issue leases on lands beneath inland navigable waters, which were held in trust for the future State of Alaska. The Department of the Interior sponsored a bill to remedy this defect, which was enacted into law on July 3, 1958, as the Alaska Submerged Lands Act (72 Stat. 322; 48 U.S.C. 456 and 30 U.S.C. 251). With specific intent to give recognition to the equities of those who had spent large sums to find Alaska's only commercial production of oil—which was, of course, in the Moose Range—Congress granted a preference right to holders of existing leases or applications for leases to have the inland navigable waters within the boundaries of those leases or applications included therein. Both the existing leases and the long pending applications within the Moose Range were specifically brought to the attention of Congress during the consideration of this act.¹⁸

On August 2, 1958, and pursuant to the revised regulation adopted on January 8, 1958, the Secretary published in the Federal Register a notice announcing that agreement had been reached between the Bureau of Land Management and the Fish & Wildlife Service with respect to the Kenai Moose Range (23 F.R. 5883). The notice specified that certain lands within the Range (essentially, the

¹⁸Hearings before Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess., on H.R. 8054, pp. 77, 101.

southern half) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." and that "the balance of the lands within the Kenai Moose Range are subject to the filing of oil and gas lease offers."¹⁹ The notice went on to provide that

"* * * lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office * * *"

and that all lease offers filed within ten days after that would be treated as having been filed simultaneously.

As to existing offers, the notice also provided that

"offers to lease covering any of these lands which have been pending and upon which action was suspended * * * will now be acted upon and adjudicated in accordance with the regulations * * *"²⁰

In a press release issued shortly before publication of the notice of the agreement, and before the respondents filed the offers on which they now rely, the Secretary made clear that most of the lands open to leasing were already covered by existing offers, and that in fact the area available for new applications would be small. In a Department of Interior Press Release dated July 25, 1958,

¹⁹The closing of a part of the Range was an exercise of the Secretary's discretion not to issue leases, rather than an exercise of his delegated power to withdraw lands (Richard K. Todd (1961) 68 I.D. 291).

²⁰Under the regulations, priority as among the simultaneously filed offers was to be determined by a drawing (43 C.F.R. 295.8). However, as the notice made clear, all simultaneously filed offers were subject to existing offers, if valid.

it was stated that "Most of these lands are now covered by applications that will be adjudicated under regulations of the Department."

The agreement between the Bureau of Land Management and the Fish & Wildlife Service covering the Moose Range was noted in the Anchorage Land Office on August 4, 1958. The respondents filed their applications on the tenth day after that, to-wit, August 14, 1958. When they did so, they had at least constructive knowledge that the lands they applied for were covered by prior applications,²¹ and actual knowledge that these previous offers would have priority.²²

Shortly after the agreement was noted in the land office records, the processing of the pending but suspended applications was resumed, as provided by the Secretary's order. Since, as has been noted (*supra*, p. 11), only final action on these applications had been suspended, this processing moved quickly.

Effective September 1, 1958, the land office granted leases on the lands in suit to the first qualified applicants therefor—who, of course, were not respondents—on the basis of their offers which had been pending since January, 1955.

²¹James C. Forsling (1938) 56 I.D. 281, 285-286.

²²See letter of June 13, 1958, from Asst. Secretary of the Interior Ernst, advising Respondent Bailey E. Bell that "While the order of 1953 suspended issuance of leases for lands within wildlife areas, it did not prohibit the filing of offers for such lands. Consequently, all offers filed for lands in the Kenai Moose Range prior to the approval of the regulations of January 8, 1958, have a priority of filing as of the date received in the Anchorage Land Office" (Appendix, p. ii).

Leases covering the lands herein in dispute were issued to a number of different individuals, who later entered into agreements for the operation thereof with amici Richfield Oil Corporation, Standard Oil Company of California, Marathon Oil Company and Union Oil Company of California, or assigned them outright to one or more of these companies. Many other leases were issued to local residents of Alaska who had applied for them in the fall of 1954 and early 1955.

When in due course the applications filed on August 14, 1958, were reached for adjudication, those in conflict with prior offers and with leases already issued pursuant to such offers, including the applications filed by respondents, were rejected for lack of priority.

Legal Proceedings

Following rejection of their applications by the Anchorage Land Office, respondents appealed, and the rejection was affirmed by the Director and the Acting Director of the Bureau of Land Management and by the Secretary of the Interior. The decision of the Secretary is reported in 68 I.D. 256.

Following the Secretary's affirmance of the rejection of their applications, respondents brought suit in the Federal District Court for the District of Columbia to compel the Secretary to issue oil and gas leases to them. None of the applicants for leases on the lands in question who were prior in time to respondents, and none of those interested in the leases granted pursuant to such prior applications, including amici Standard Oil Company of

California and Richfield Oil Corporation, was named as a party to this action or given any notice of its filing.

The district court granted summary judgment in favor of the Secretary, dismissing respondents' complaint. The Court of Appeals for the District of Columbia reversed, and ordered leases issued to respondents.²³ Amici learned of the existence of this case for the first time when the Court of Appeals' decision was handed down, and lent their support to petitioner's application to that Court for a rehearing, which was denied. This court granted certiorari.

SUMMARY OF ARGUMENT

An examination and analysis of Executive Order 8979, within its four corners, shows that it did not close any part of the Moose Range to oil and gas leasing. The order was intended only to prevent alienation of the title of the United States.

Since E.O. 8979 did not close any part of the Range to leasing, clearly Public Land Order 487 did not.

The Interior Department has repeatedly and consistently construed the orders creating and governing the Moose Range, and others like them, as leaving the lands

²³The Court of Appeals was misled as to the facts. In both their Opening Brief (p. 30) and their Reply Brief (p. 3), respondents told the Court of Appeals that no leases were issued covering lands within the Moose Range between 1941 and 1958. In their Opening Brief (p. 40), respondents also told the Court of Appeals that "The discovery as well as the increased activity were in areas of the Kenai Peninsula outside of the Kenai National Moose Range * * *." Amici, not being parties to the litigation, were unable to correct these misstatements of fact.

involved open for leasing, within the discretion of the Secretary. This long-standing construction facilitates the Government's policy of encouraging the multiple use of public lands. It has been made a matter of public record many times, and many hundreds of leases within the Moose Range have been issued upon the basis of it, and a great many millions of dollars spent exploring and developing these leases. It should not be disturbed now unless it is plainly wrong, which it is not.

Both Congress and the President have ratified and confirmed this construction.

Amici are indispensable parties to this action, since they hold existing Federal leases on the lands on which respondents now seek leases from the Secretary.

I

NEITHER E.O. 8979 NOR P.L.O. 487 CLOSED THE LANDS WITHIN THE MOOSE RANGE TO OIL AND GAS LEASING.

As noted above, E.O. 8979 of December 16, 1941 (6 F.R. 6471) withdrew some two million acres of land and water on the Kenai Peninsula "for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose," and provided that none of the lands withdrawn

" . . . shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to provide for the leasing of public lands in

Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon', 44 Stat. 1452, U.S.C., title 48, secs. 471-471o."

The Court of Appeals held that this order closed the unexcepted lands within the Moose Range to oil and gas leasing from 1941 to 1958, and that the leases issued on applications filed during that period, including those held by amici, are "nullities".

P.L.O. 487 of June 16, 1948 (13 F.R. 3462) withdrew most of the lands excepted from the original Moose Range order

"from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation."

The Court of Appeals also held that this order closed the lands covered thereby to oil and gas leasing.

The Court erred in both instances.

A. Under the rule of *eiusdem generis*, the word "disposition" in E.O. 8979 means only a disposition leading to alienation of title of the United States.

E.O. 8979 withdrew the lands covered thereby "from settlement, location, sale or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under" the fur farming and livestock grazing acts of 1926 and 1927. The words "settlement, location, sale or entry"

are all technical words having definite meanings in the parlance of the public-land laws. Each contemplates or encompasses a final acquisition from the Government of title to the lands referred to. Neither a permit to prospect for oil nor a lease to extract oil on lands owned by the United States obtained under the Mineral Leasing Act would or will secure to the permittee or lessee the right finally to acquire title to the land covered by the permit or lease issued by the Government.

Under the doctrine of *ejusdem generis*, therefore, the general expression "or other disposition" following immediately after the specific words "settlement, location, sale or entry" must be construed to mean only dispositions conveying or leading to the conveyance of the title of the United States, such as, for example, a "grant", "selection" or "allotment" of public lands, each of which is a form of alienation of title not covered by the specific words enumerated.^{23a} (See Public Law No. 679 of 1929 (45 Stat. 1091) and Public Law No. 171 of 1906 (34 Stat. 197) *infra* p. 22). It does not, therefore, include leasing under the Mineral Leasing Act.^{23b}

- B. The reference in E.O. 8979 to the leasing acts of 1926 and 1927 shows that the preceding language was intended to refer only to dispositions leading to alienation of the title of the United States.

The reference to the acts of 1926 and 1927 in E.O. 8979 clearly shows that the word "disposition" does not include leasing, but was meant to refer only to public land

^{23a}See 2 Sutherland on Statutory Construction (3d Ed.) p. 395.

^{23b}See opinion of Solicitor General of the Interior Department dated September 30, 1921 (48 I.D. 459, *infra* p. 30).

laws providing for alienation of the title of the United States. The 1926 and 1927 acts were referred to because they provided for leasing rather than the "disposition" of lands.

The Court of Appeals' contrary conclusion is clearly erroneous. It sought to explain the reference to the 1926 and 1927 acts by construing the phrase "any of the public land laws applicable in Alaska" to mean laws of general applicability throughout the country which are applicable in Alaska, and held that the 1926 and 1927 acts were specifically referred to because they did not come within this category.

If the Court of Appeals were correct in this conclusion, then E.O. 8979 did not withdraw the lands in the Moose Range from the operation of any of the public land laws applicable to Alaska alone *except* the fur farming and livestock grazing acts of 1926 and 1927 specifically referred to. For example, a statute of March 3, 1891 (26 Stat. 1099; 48 U.S.C. 355) provided that "lands in Alaska may be entered for townsite purposes, for the several use and benefit of the occupants of such town sites * * *"; Public Law 171 of 1906 (34 Stat. 197; 48 U.S.C. 357) was "An Act authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska"; Public Law 679 of 1929 (45 Stat. 1091; 48 U.S.C. 354a) was "An Act making an additional grant of lands for the support and maintenance of the Agricultural School and School of Mines of the Territory of Alaska, and for other purposes," and authorized the Territory to select 100,000 acres of public lands for the benefit of the schools named;

and Public Law 863 of 1940 (54 Stat. 1192; 48 U.S.C. 363) was an act "To authorize the Secretary of the Interior to sell or lease for park or recreational purposes, and to sell for cemetery purposes, certain public lands in Alaska." Doubtless other public-land laws applicable specifically to Alaska could be found.

It is quite clear that the President, in creating the Kenai Moose Range, intended to withdraw the lands involved from allotment, grant or sale under these and similar acts, and that the Court of Appeals' contrary construction of E.O. 8979 is directly contrary to this obvious intention.

E.O. 8979 also provided that the reservation and use of the excepted lands as part of the Moose Range should be without interference with the use and disposition thereof pursuant to "the public land laws applicable to Alaska". If the Court of Appeals' construction of this phrase were correct, the order meant that this excepted area was open to use and disposition under public land laws applicable throughout the country and also applicable in Alaska, but not under public land laws applicable only to Alaska—a patent absurdity.

In addition, in reaching its construction of the order, the Court of Appeals violated several basic and accepted rules of construction. The first rule of construction is, of course, that the words of a statute or other document are to be taken according to their natural meaning (*Mason v. United States* (1923) 260 U.S. 545, at 554, 67 L.Ed 396, at 399). The natural meaning of "any public-land law applicable to Alaska" is any such law so applicable, whether

one generally applicable throughout the country and also applicable to Alaska, or one applicable to Alaska alone.

The Court of Appeals not only ignored the word "any" in the reference to public land laws, but read into the order the bracketed and italicized words: "under any of the public-land laws [*of general application which are also*] applicable to Alaska." In 57 Am.Jur., section 1153, pages 750-751, it is said that while in construing wills, words, phrases and clauses may sometimes be supplied, "this procedure is to be sparingly employed and is never to be resorted to upon mere conjecture or hypothesis as to the testator's intention." That rule is applicable here, since the addition of the words supplied by the Court of Appeals cannot be said to rest on anything more than mere conjecture.

Further, if, as the Court of Appeals said, "disposition" was meant to include leasing, the words "to classification and lease" in the reference to the acts of 1926 and 1927 are rendered tautological and superfluous, and should have been omitted, or replaced by the words "to disposition." Thus E.O. 8979 provided that

"None of the above described lands * * * shall be subject to settlement, location, sale, or entry, or other disposition (except for fish-trap sites) under any of the public-land laws applicable to Alaska, or to *classification and lease* under * * * the act of July 3, 1926 * * * or the act of March 4, 1927 * * *" (italics added).

If the Court of Appeals were correct, the italicized words could have been omitted. Since they were not, they must be given some effect, under the settled rule that some effect must be given to all words, clauses and provisions

in a statute or other instrument.²³⁰ If the words "to classification and lease" are given effect, the previous word "disposition" must *not* include leasing.

Another rule of construction is that where varying expressions are used, different meanings are intended (see 50 Am.Jur., sec. 274, p. 261). If the Court of Appeals was correct in its construction of the order, the order could have simply repeated the word "disposition" instead of saying "classification and lease" under the 1926 and 1927 acts. Since it did not, something different must have been intended by the different expressions—ergo, "disposition" does *not* include leasing.

The Court of Appeals' construction of E.O. 8979 is therefore plainly wrong.

C. The Court of Appeals construction was based upon the presence of the fish trap exception, which had no place in the order.

The Court of Appeals gave no reason for adopting its explanation for the reference to the 1926 and 1927 leasing acts, in violation of all of the aids to construction referred to above, except to say that the specific exemption of fish trap sites in the order strengthened its conviction that its explanation was correct. Continuing, the court said:

²³⁰In 2 Sutherland on Statutory Construction (3d Ed.) at page 339, it is stated:

"It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous * * *."

See also *Mason v. United States* (1923) 260 U.S. 545, at 554.

"If the order were designed to cover only the total alienation of the interest of the United States, then specification of fish trap sites would be unnecessary, for permission to fish by traps is acquired not by deed but by a license, similar in many respects to a lease. Furthermore, the specific inclusion of one exception in the order indicates that other exceptions should not be implied (as the Secretary urges) but that the prohibition on disposition should be read in an expansive manner."

Permission to fish by traps was not, however, and could not be "acquired . . . by a license, similar in many respects to a lease," as the Court of Appeals said. Section 1 of the Alaska Fisheries Act of 1924 (43 Stat. 464), the so-called "White Act," specifically provided that "no exclusive or several right of fishery shall be granted" in Alaska; and an Opinion of the Solicitor of the Interior Department dated March 20, 1942 (58 I.D. 1), concurred in by the Attorney General of the United States on April 8, 1942 (40 Ops. Atty. Gen. 175), makes clear that one acquired a fish-trap site in Alaska simply by being the first to occupy it under a common right of fishery, and not by virtue of any license or lease of the site.

In *Hynes v. Grimes Packing Co.* (1949) 337 U.S. 86, at 121, 93 L.Ed. 1231, at 1256, cited by respondents to the Court of Appeals, this Court said that "licenses for fishing *may* be required in areas regulated under the White Act" (*italics added*). The Court followed this immediately, however, by saying "We think, however, these licenses may be only regulatory in character . . ." Obviously, therefore, if such licenses had been issued they could not have been similar to leases.

In *Kake Village v. Egan* (1962) 369 U.S. 60, at 62, this Court confirmed this, saying with regard to fish-trap sites in Alaska,

"Moreover, the White Act gives the Secretary power only to limit fishing, not to grant rights."

The opinion of the Solicitor of the Interior Department, dated March 20, 1942 (58 I.D. 1), shows that at that time the Territory of Alaska issued licenses to take fish from Alaskan waters, and that the War Department issued permits certifying that the erection of fish traps at given points would not interfere with navigation, but these licenses and permits gave no right to occupy a particular site. The opinion in *Kake Village v. Egan*, supra, shows that at that time permits were also obtained from the Forest Service to anchor fish traps on the uplands, but this Court said of these permits, as well as of the permits obtained from the War Department (369 U.S. 63):

"Like a certification by the Interstate Commerce Commission, each is simply acknowledgment that the activity does not violate federal law."

The Court of Appeals was wrong, therefore, in saying that licenses similar to leases were issued for fish-trap sites. No license was issued giving any right to occupy a particular fish-trap site, whether similar to a lease or otherwise.

It is clear, therefore, since there was no disposition by the United States of any interest of any kind in public lands for fish-trap sites, that the exception for such sites in E.O. 8979 does not refer back to the previous word "disposition" in that order.

On the contrary, the exception was inserted merely for the general purpose of making clear to Alaskans that fish-trap sites in the Moose Range were not forbidden by the order. Fishing was the principal industry in the Territory,²⁴ and according to the Commissioner of Indian Affairs, the "life [of the Indians in Alaska] was based largely on the salmon catch."²⁵ It was highly important, therefore, that the Alaskans not get the mistaken idea that they could no longer establish fish-trap sites in the Kenai Moose Range.

The exception is obviously out-of-place, and from a technical legal point of view has no relation to the provision in which it is contained, and should not be there at all. In the light of this illogicality, surely property rights worth hundreds of millions of dollars, and the vital interests of the newest state in the Union, are not to turn on the mere inclusion of an exception having basically nothing to do with the provision in which it was included.

D. P.L.O. 487 did not close any lands within the Range to leasing.

As noted above, E.O. 8979 excepted certain lands within the Moose Range from its operation. P.L.O. 487 withdrew most of these excepted lands from "settlement, location, sale or entry." This order contained no reference to "other disposition," to "public-land laws applicable to Alaska," to "fish-trap sites," or to the fur-farming or livestock-grazing leasing acts of 1926 and 1927. Despite this, and without giving any explanation for its holding,

²⁴Report No. 2379, House of Reps., 76th Cong., "Investigation of the Fisheries of Alaska."

²⁵57 I.D. 461, at 462.

the Court of Appeals also held that P.L.O. 487 closed the lands covered thereby to mineral leasing until it was revoked in its entirety on September 9, 1955.

If the Court of Appeals' construction of E.O. 8979 was wrong—as it was—then obviously its construction of P.L.O. 487 was also wrong.

Since we have demonstrated the former, we shall not discuss the latter further.²⁷

II

THE SECRETARY'S CONSTRUCTION OF E.O. 8979 AND P.L.O. 487 AS LEAVING THE MOOSE RANGE OPEN TO LEASING HAS BEEN UNIFORM AND CONSISTENT OVER A LONG PERIOD OF TIME, AND SHOULD NOT BE DISTURBED.

- A. The Government's construction of E. O. 8979 and P.L.O. 487 as leaving the Moose Range open to oil and gas leasing is confirmed by the well-established practice of the United States in making and construing withdrawals both before and after 1941.

In the early days one acquired the right to extract oil and gas from public lands by making a location under the placer mining law (17 Stat. 91; 29 Stat. 526). Upon proof of a valuable discovery, the locator could obtain a patent from the United States conveying full title to the land.

²⁷Of the ten lease applications by Respondents rejected by the Secretary, only the W. E. Coyle application was for lands covered by P.L.O. 487. The other nine applications were for lands within the Range not covered by P.L.O. 487. The lands covered by the Coyle application were leased by the Secretary on the basis of prior applications filed while P.L.O. 487 was in effect.

On July 17, 1914, Congress enacted a bill providing for agricultural entry of lands withdrawn, classified or reported as containing minerals (38 Stat. 509), and on December 29, 1916, it enacted a bill permitting stock-raising entries, with all the minerals being reserved to the United States (39 Stat. 862). These "separation acts" were the first declaration by Congress of a policy of multiple use of public lands.

The Mineral Leasing Act of February 25, 1920 (Stat. 437, 30 U.S.C. 181, et seq.) was an extension of this policy. It did away with the practice of disposing of the Government's title to mineral lands for nominal sums under the mining laws, and inaugurated a new policy under which the Government retained title to the lands. Specific minerals enumerated in the Act, including oil and gas, were made subject to prospecting permits and leases (see *Ickes v. Development Corp.* (1935) 295 U.S. 639, 645).

Soon after the Mineral Leasing Act was adopted, a question arose as to the effect of the later Federal Water Power Act of June 10, 1920 (41 Stat. 1063), which provided that lands included in any project under the Act were "reserved from entry, location or other disposal under the laws of the United States * * *." In an opinion dated September 30, 1921 (48 I.D. 459), the Solicitor of the Interior Department concluded that such lands were still open to leasing under the Mineral Leasing Act. Saying that "entry" and "location" are technical words describing initial steps looking to the final acquisition of title from the Government, he applied the rule of "*ejusdem generis*" to reach the conclusions that "other disposal" also meant only actions leading to an alienation of title.

Since that time, it has been a consistent practice of the Interior Department in drafting and making withdrawal orders and reservations expressly to negative leasing under the Mineral Leasing Act where that was intended. This practice was in accord with the Government's policy of promoting the multiple use of public lands where appropriate. This policy was expressed as follows, as to wildlife refuges, in the Secretary's report to the President for the fiscal year ended June 30, 1952 (p. 329):

"Refuges are managed on a multiple-use basis, so far as this can be accomplished without defeating the primary objective for which each was established."

In the Appendix to their Brief in Support of Petition for Certiorari, amici listed in three tables, and for the period from 1920 through 1952, the orders withdrawing public lands containing language substantially the same as that contained in E.O. 8979, those containing language essentially the same as that contained in P.L.O. 487, and those containing language expressly barring mineral leasing. (These tables are also set forth in the Appendix to the brief of amici Marathon Oil Company and Union Oil Company of California on the merits). These tables show that during the years 1920-1952, some 264 withdrawal orders used language substantially the same as that employed in E.O. 8979, and at least 413 contained language identical to that in P.L.O. 487. Under the rationale of the Court of Appeals' holding in this case, all oil and gas and other leases issued on the lands covered by these 677 withdrawal orders would be "nullities."

On the other hand—if the Court of Appeals' ruling is correct—the Interior Department some 173 times during

these years used entirely different language to accomplish the same result—i.e., sometimes expressly withdrew lands from mineral leasing, and sometimes withdrew lands from leasing by general language similar to that employed in E.O. 8979 and P.L.O. 487.

The orders listed in Tables I, II and III show conclusively that when the Government intended to withdraw lands from mineral leasing, it said so expressly.

Over the years involved, the Interior Department repeatedly ruled, as it had in its Opinion of September 30, 1921, *supra*, p. 34, that withdrawn or reserved lands were open to mineral leasing unless it was expressly provided otherwise. These rulings facilitated the Government's policy of compatible, multiple use of Federal lands, for under them withdrawn lands were open to leasing, but the Secretary in his discretion could refuse to issue leases if he concluded that they would interfere with the purposes for which the lands were withdrawn. Thus in an Opinion dated February 8, 1935 (55 I.D. 205), the Solicitor of the Department held that oil and gas permits and leases could be issued on lands withdrawn by an executive order from "settlement, location, sale or entry," saying with respect to the Mineral Leasing Act (p. 211):

"* * * that act is operative within reserved areas, with certain specified exceptions."

The exceptions referred to by the Solicitor clearly were those provided for in the statute itself, which, as has been noted, do not include wildlife areas.

In 1951, the leading treatise on the issuance of oil and gas leases on public lands described the Department's practice as follows:

"Ordinarily a withdrawal from sale or other disposition of the public domain is no bar to the issuance of a lease, as leasing is not disposing of the land, it is merely granting the right to prospect and, upon discovery, to produce oil or gas from the land under prescribed conditions. Title to the lands and the minerals therein remain in the United States."

L. E. Hoffman, *Oil and Gas Leasing on the Public Domain* (1951), pages 33-34. Mr. Hoffman was then the Chief of the Branch of Minerals of the Bureau of Land Management.

In *Noel Teuscher et al.* (1955) 62 I.D. 210, the Solicitor of the Interior Department concluded that lands withdrawn "from settlement, location, sale or entry, and held for the exclusive use and benefit of the United States Navy Department for naval purposes" were still open to oil and gas leasing, and in so doing affirmed (p. 213):

"the rule that in general withdrawn or reserved lands are subject to leasing under the Mineral Leasing Act."²⁸

The Government has for 44 years, therefore, followed a policy of saying so expressly when it intended to withdraw lands from mineral leasing. In every case in which the question has been raised, the Interior Department has held that orders which did not expressly so provide did

²⁸The *Teuscher* case was recently followed in connection with another wildlife refuge (see *Paul Gordon, Amerada Petroleum Corporation* (1963) 70 I.D. 225). *Teuscher* was cited with approval in Senate Report 1549 of June 10, 1960, on H.R. 10455 (the Mineral Leasing Act Revision of 1960), 86th Cong., 2d Sess.

not withdraw the lands from oil and gas leasing.²⁹ The Court of Appeals has, with no reference to and, so far as its opinion shows, no consciousness of this policy, completely rewritten this long history, given hundreds of withdrawal orders a meaning never intended by their authors, and struck a major blow at the compatible, multiple uses policy of the Government.

- B. The Government's construction of E.O. 8979 and P.L.O. 487 as leaving the Moose Range open to leasing is confirmed by the subsequent amendments to these orders specifically closing certain portions of the Range to leasing.

As has been noted above, E.O. 8979 withdrew lands within the Moose Range from "settlement, location, sale or entry, or other disposition (except for fish-trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under" the acts of 1926 and 1927.

P.L.O. 487 simply withdrew the lands excepted from the first order from "settlement, location, sale or entry."

In P.L.O.s 751 and 778, issued by the Secretary in 1951 (supra p. 6), lands covered by P.L.O. 487 were withdrawn for townsite purposes and for the use of the Civil Aeronautics Administration and the Army from

"all forms of appropriation under the public-land laws, *including the mining laws and the mineral leasing laws*" (italics ours).

If, as the Court of Appeals held, P.L.O. 487 had withdrawn the lands from all forms of "disposition" under

²⁹In *D. Miller* (1948) 60 I.D. 161, the Solicitor reached a conclusion contrary to this, but in *Noel Teuscher et al.* (1955) 62 I.D. 210, *Miller* was overruled.

the general land-laws, including mineral leasing, these orders were unnecessary, and the express withdrawal from the mining and mineral leasing laws accomplished nothing.

- C. The Interior Department has consistently treated the bulk of the lands within the Moose Range as open to oil and gas lease applications, from the creation of the Range down to the present day, except for the period during which it was closed by the regulation of January, 1953.

As has already been noted, the first application for an oil and gas lease covering lands within the Kenai Moose Range was filed on May 21, 1953. It was Anchorage No. 024159, filed in the Anchorage Land Office by one Amy Greenwood and covered 2560 acres, approximately 20 acres of which were located within the area withdrawn by E.O. 8979. The application was accepted, processed, and a lease pursuant thereto issued effective October 1, 1953.²⁰

In 1954, four more leases were issued on lands lying partly within the area covered by E. O. 8979, one to Richard K. Todd and three to Charles D. Ealand. One of the leases to Ealand covered more than a full section of land within the Moose Range.

In 1955, three more leases were issued on lands lying partly within the area covered by E.O. 8979, two to L. E. Grammer and one to amicus Marathon Oil Co. (then Ohio Oil Co.). One of the leases to Grammer covered more than 3 sections of land lying within the area covered by E.O. 8979, and the lease to Marathon covered one full section lying within this area. Twenty-two more leases

²⁰These data and the other data contained in this point, except where otherwise noted, appear in the records of the Anchorage Land Office.

were issued on lands covered in their entirety by P.L.O. 487, two to L. E. Grammer prior to the revocation of that order, and twenty to amicus Marathon after its revocation, but all on the basis of applications filed during the existence of the order.

In 1956 two more leases were issued on lands lying partly within the area covered by E.O. 8979, one to Walter L. Hamshaw and one to F. E. Sullivan; and one more lease was issued, to Paul Combs and G. J. Welch, on lands which had been covered by P.L.O. 487, based on an application filed during the existence of that order.

During the latter part of 1956 and early part of 1957, 31 additional leases were issued in what became the Swanson River Unit of the Kenai Moose Range. These leases covered 71,680 acres "withdrawn" by E.O. 8979, and were issued with the approval of the House of Representatives Committee on Merchant Marine & Fisheries. It was on these leases that amicus Richfield Oil Corporation discovered oil the following year:

In each case, of course, the Government treated the Moose Range lands in question as open to leasing, and issuance of the leases referred to was noted on the Land Office records.

While the number of leases within the Moose Range actually issued was rather small because of the "suspension order" referred to above, numerous applications for leases within the Range were filed and accepted.

In his Annual Report for the fiscal year ended June 30, 1955, the Governor of Alaska said (pp. 60-61): "The Kenai Moose Reserve is covered with 325 lease applications

awaiting decision of the Secretary of the Interior as to what stipulations for the protection of wild life should be inserted in leases, if they are issued." A memorandum from the Solicitor of the Interior Department to Under Secretary Davis dated May 30, 1956, reported that on December 1, 1955, there were 424 oil and gas lease offers for lands within the Kenai Range. According to the records of the Land Office at Anchorage, a total of 133 individuals and companies filed 703 applications for oil and gas leases within the Moose Range during the period 1953 to January 1, 1958. None of these applications or offers was, of course, rejected when it was filed; each was accepted, given priority according to its date of filing, and placed under suspension for the time being in accordance with one or another of the directives of the Bureau of Land Management.

The acceptance, rather than the rejection, of each was confirmation of the consistent position of the Government that the Range was at all times, up until January 8, 1958, open to oil and gas leasing.

In August, 1958, the Anchorage Land Office began issuing oil and gas leases on lands in the northern half of the Moose Range. Applications were adjudicated on the basis of the priority of time of filing and, since many of the long-pending applications had already been given all but final processing, in accordance with the March 30, 1956, instructions, leases were quickly issued thereon. New unit plans of operation were promptly approved and additional drilling was permitted to proceed thereunder. All told, 433 leases covering over 900,000 acres were issued pursuant to applications filed prior to 1958.

By October, 1960, a pipe line running from the producing area of the Moose Range to the ocean was completed, and the Secretary has accepted since then substantial royalties in accordance with the terms of the leases covering the producing areas. Ninety per cent of the royalties has been distributed annually to the State of Alaska and the remaining 10 per cent has been paid into the general funds of the United States.

In all administrative proceedings subsequent to August 2, 1958, the Secretary also uniformly treated the Moose Range as having been open to oil and gas leasing since the issuance of E.O. 8979. In addition to denying the claims of respondents on the ground that others were the first qualified applicants, the Secretary in his decision in *Richard K. Todd* (1961) 68 I.D. 291, reaffirmed that the Moose Range had been open to leasing prior to August 2, 1958, and held that his broad discretionary powers to withhold leases when the national interest so required justified the rejection of applications for leases on the southern half of the Moose Range. Subsequently, the Secretary ruled that the leases issued on the northern half of the Range were entitled to five-year extensions of their primary terms under the Mineral Leasing Act (30 U.S.C 226-1) because the Moose Range was not "withdrawn from leasing" under the statute.

In all its orders, regulations and actions from 1941 down to the present, the Government has consistently treated the Moose Range as open to leasing. This uniform and long continued construction of the orders creating and governing the Range is entitled to great weight,

and should not be disturbed unless it is plainly wrong, or clearly unlawful—which, of course, it is not.

Power Reactor Co. v. Electricians (1961) 367 U.S. 396, 408;

F.T.C. v. Mandel Brothers (1959) 359 U.S. 385, 391;

Okanogan Indians v. United States (the Pocket Veto case) (1929) 279 U.S. 655, 689;

Universal Battery Co. v. United States (1930) 281 U.S. 580, 583;

Lucas v. American Code Co. (1930) 280 U.S. 445, 449.

III

THE SECRETARY'S CONSTRUCTION OF THE ORDERS CREATING AND GOVERNING THE MOOSE RANGE HAS BEEN RATIFIED AND CONFIRMED BY CONGRESS AND THE PRESIDENT.

- A. Congress has repeatedly confirmed the Secretary's construction of the governing orders as leaving the Moose Range open to leasing.

When bills were introduced in Congress at the beginning of 1956 to restrict oil and gas leasing of wildlife refuges, the House Committee on Merchant Marine & Fisheries and the Subcommittee on Merchant Marine & Fisheries of the Senate Committee on Interstate and Foreign Commerce held extensive hearings thereon.

During these hearings both Committees were advised that 21 oil and gas leases had been issued on lands within the Kenai National Moose Range in 1954 and 1955. It was the Government's position, which both Committees accepted, that the lands in question were open to leasing,

within the discretion of the Secretary of the Interior, and that the only question involved was whether, in the exercise of this discretion, the Secretary should have issued these leases or should issue any more such leases. His authority to do so was never questioned.

At the hearings thorough consideration was given to the question whether the proposed bill would restrict the authority of the Secretary to issue oil and gas leases within national wildlife refuges. The bill restricted the power of the Secretary of Interior to "dispose of" such areas, but various Government officials not only asserted that a "disposition" did not include a grant of oil or gas leases,³¹ but also asserted that no secondary use of national wildlife refuges was restricted by such language.³²

³¹The following discussion took place between L. E. Hoffman, minerals staff officer, Bureau of Land Management and Representative Bonner:

"The Chairman [Bonner]. There is a proposed amendment to the bill which the committee has at the present time, which will apply to leasing on lands owned and operated by the Fish and Wildlife Service.

"Mr. Hoffman. Without such amendment, I don't think this would prevent leasing. This would prevent the sale or turning over of refuge lands, *but leasing is not a disposition.* The Government maintains fee-simple title in the lands. It maintains control over the leased area. It is merely the right to extract particular minerals, such as oil or gas from the land, on the payment of a royalty to the Government, or the Government may take the proportionate share of the oil in kind."

Hearings (January 19-20, and February 20-21, 1956) before the Committee on Merchant Marine & Fisheries on H.R. 5306, H.R. 6723, and H. R. 8839 (Protection of National Wildlife Refuges), 84th Cong., 2d Sess., p. 98.

³²See generally, Statement of Donald Chaney, Acting Assistant Solicitor, Fish & Wildlife Service, Hearings (February 23-24, 1956) before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.2101 (Protection of National Wildlife Refuges) 84th Cong., 2d Sess., pp. 66-69.

The result of this contention was a proposed amendment to the bill and to the Mineral Leasing Act which would have specifically restricted the power of the Secretary to issue oil and gas leases within refuges.

Neither committee reported favorably on the pending bills²³ proposing amendment of the Mineral Leasing Act. However, the House Committee submitted a report (No. 1941, 84th Cong., 2d Sess.), stating that it had been decided to try, for an experimental period of time, an arrangement between the Secretary of the Interior and the Committee, under which each proposed alienation or relinquishment of any interest the Fish & Wildlife Service had in lands under its jurisdiction would be submitted to the Committee, and the Committee would have 60 days to indicate its approval or disapproval of the action contemplated. The resolution of the issue in this manner clearly demonstrates that Congress recognized the an-

²³This was consistent with long-standing Congressional policy. Congress knew full well that many bird refuges had been created on the public domain by Executive Order (See *United States v. Midwest Oil Co.* (1915) 236 U.S. 459), but it did not, in 1920 or at any time thereafter, exclude refuges from the lands covered by the Mineral Leasing Act. Also, Congress knew that Wildlife refuge lands purchased by the United States would be subject to oil and gas leasing under the Mineral Leasing Act for Acquired Lands (61 Stat. 913; 30 U.S.C. 351) adopted in 1947. In 1952 the Chairman of the House Interior and Insular Affairs Committee stated (House Report No. 2511, 82d Cong., 2d Sess., footnote 2 on p. 1), "Public lands withdrawn for wildlife refuges are not subject to most public land laws except the mineral leasing and right-of-way laws." The Multiple Mineral Development Act, of 1954 (68 Stat. 708; 30 U.S.C. 521), which amended both the Mineral Leasing Act and the Atomic Energy Act, restricted the authority of the Atomic Energy Commission to issue leases for source materials on wildlife refuges; an identical amendment to the Mineral Leasing Act restricting the authority of the Secretary of the Interior to issue oil and gas leases on such refuges was rejected. See Cong. Rec., Feb. 2, 1956, p. 1929.

thority of the Secretary of the Interior to issue oil and gas leases and that the sole concern of the Committee was sharing the Secretary's discretionary authority.

Pursuant to that arrangement, the House Committee on Merchant Marine & Fisheries held a public hearing on July 20 and 25, 1956, on a proposal from the Fish & Wildlife Service for the issuance of oil and gas leases on approximately 70,000 acres of land in the northern half of the Moose Range for which lease applications had been filed in 1954 by amicus Richfield Oil Corporation and a number of individuals.³⁴ The proposal contemplated that the leases would be subject to the Swanson River Unit plan of operation, which was approved by the Bureau of Land Management, the Geological Survey and the Fish & Wildlife Service, all branches of the Department of the Interior. A special "Operating Program" was also negotiated between Richfield and the Fish & Wildlife Service to insure full protection of wildlife values.

At the hearing a spokesman for the National Wildlife Federation argued that E.O. 8979 precluded the issuance of oil and gas leases in the Moose Range (see p. 4 of Statement by Charles H. Callison, following p. 15 of Transcript). On July 25, 1956, the Chairman of the Committee advised the Director of the Fish & Wildlife Service that the Committee unanimously concluded that issuance of the leases would not be detrimental to the wildlife

³⁴See Transcript of Hearings before House Committee on Merchant Marine & Fisheries, July 20 and 25, 1956, "Lease of Portions of Kenai National Moose Range".

values of the Moose Range, and that the Committee concurred in the proposal to issue the leases.³⁵

Following the Committee's approval the leases were issued, an exploratory well was drilled, and oil was discovered in commercial quantities in July, 1957. A title defect in these leases then became extremely important, and the leases came under further Congressional review. The defect lay in the fact that the Secretary had authority to issue leases on dry lands, but not on lands beneath inland navigable waters in Alaska. Hence the Secretary of the Interior asked Congress for authority to issue leases on Alaskan water bottoms, and to add to the leases already issued in Alaska and to applications pending in Alaska the water bottoms within their boundaries. In the hearings before the Senate Committee on Interior and Insular Affairs on the proposed bill, Mr. Gordon Goodwin, attorney for amicus Richfield Oil Corporation, testified on May 14, 1958:³⁶

"Mr. Goodwin. Well, we have pending, have had for 2 or 3 or more years, application for leases in the Kenai moose range, and a few leases were issued in there, and that is where the discovery was made."

³⁵The Chairman's letter advised that Mr. Bartlett, the delegate from Alaska, joined with representatives of the Interior Department in testifying that there would be no detriment to the wildlife in the area. Mr. Bartlett obtained from the Deputy Solicitor of the Interior Department and presented to the Committee an opinion that E.O. 8979 did not prohibit leasing of lands in the Moose Range for oil and gas purposes (see Transcript of Hearings, pp. 29-30A; and Appendix, p. iv).

³⁶Hearings before Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess., on H.R. 8054, p. 77.

The Senate Committee reported favorably on the proposed bill, saying:³⁷

"In Alaska, there is at the present time, only one area which is now subject to the Mineral Leasing Act where oil and gas is known to exist in paying quantities, this being on the Kenai Peninsula as previously described. If prior to the effective date of this act, the producing structure on the Kenai is defined, then the holders of upland leases in such areas might be forced to compete for areas beneath adjacent lakes and streams. The committee felt that this result would work to the disadvantage of those lessees and developers who have gone ahead and developed this area"

The Congress subsequently passed, and on June 3, 1958, the President approved, the bill which was known as the Alaska Submerged Lands Act (72 Stat. 322; 48 U.S.C. 456 and 30 U.S.C. 251). In so doing the Congress clearly confirmed and ratified the issuance of the leases within the Kenai Moose Range on which the discovery by amicus Richfield Oil Corporation had been made and confirmed and ratified the construction of the Moose Range orders by the Secretary of the Interior under which he had issued those leases.

Moreover, in section 3 of the Alaska Submerged Lands Act Congress provided that all moneys received from the sale of, or as bonus, royalty and rental under, any leases issued pursuant to the Act should be paid into the Treasury of the United States, and that the Secretary of the Treasury should pay 90 per cent of such moneys

³⁷Senate Report No. 1720, 85th Cong., 2d Sess., p. 5.

to the Territory of Alaska. Having been informed that oil and gas leases had been issued in the Kenai Moose Range and that a discovery had been made thereon, this was tantamount to Congressional appropriation of 90 per cent of the royalties received from this production to the Territory of Alaska.

Lastly, in section 10 of the Alaska Submerged Lands Act, Congress provided that the annual lease rentals in leases on lands in the Territory of Alaska not within any known geological structure, and the royalty payments for production of oil or gas from such lands, should be identical with those prescribed for such leases covering similar lands in the states of the United States, except that leases issued pursuant to offers which were filed prior to and were pending on May 3, 1958, should require a first-year rental payment of 25 cents per acre. The pending applications on the Moose Range which had been brought to the specific attention of the Senate Committee by Mr. Gordon Goodwin were, of course, all filed prior to that date. In both the appropriation of 90 per cent of rentals and royalties to the Territory of Alaska and the retention of the 25 cent per acre first-year rental for leases issued on offers prior to May 3, 1958, Congress again confirmed and ratified the Secretary's construction of the Moose Range orders under which he had accepted applications for leases within the Moose Range, and issued leases within the Range prior to that time.

Thus, on three separate occasions—in rejecting the proposed wildlife bills early in 1956, in the hearings leading to the issuance of the Swanson River Unit leases later in 1956, and in the passage of the Alaska Submerged Lands

Act—Congress gave recognition to the fact that the Moose Range was open to leasing throughout the period of time during which the Court of Appeals said it was closed to leasing. In so doing it ratified and confirmed—before respondents filed their application herein in suit—the issuance of the leases within the Moose Range which the Court of Appeals has said are nullities.

See:

Power Reactor Co. v. Electricians (1961) 367 U.S. 396, 409;

Ivanhoe Irrig. Dist. v. McCracken (1958) 357 U.S. 275, 293;

Fleming v. Mohawk Wrecking & Lumber Co. (1947) 331 U.S. 111, 116; and

Brooks v. Dewar (1941) 313 U.S. 354.

B. The President ratified and confirmed the Secretary's construction of E.O. 8979 and P.L.O. 487 as leaving the Range open to leasing.

In his Annual Report to the President for the fiscal year ended June 30, 1953, the Secretary of the Interior said (p. 65):

“Of outstanding importance during fiscal 1953 was the increased interest in the development of minerals in Alaska. The geographical range of oil and gas filings in this Territory are of considerable interest. A large group have picked the areas of the Wide Bay, Cold Bay, Iniskin Bay, and from Kenai to Homer in the Kenai Peninsula.”

Kenai, on Cook Inlet, is located right in the middle of the Kenai Moose Range.

In his Annual Report for the fiscal year ended June 30, 1955, the Governor of Alaska said (pp. 60-61):

"Residents of Alaska and major oil companies have continued to file lease applications and send exploratory parties into various parts of the Territory. The Kenai Moose Reserve on the Kenai Peninsula is covered with 325 lease applications awaiting decision of the Secretary of the Interior as to what stipulations for the protection of wild life should be inserted in leases, if they are issued."³⁸

In his Annual Report for the fiscal year ended 1957, the Secretary of the Interior said (p. 356):

"Shortly after the close of the fiscal year the Richfield Corp. brought in a well in the Kenai Peninsula."

And in his Report for the fiscal year ending 1957, the Governor of Alaska said (p. 88):

"At the time of this writing, Richfield Oil Co. had announced that their first exploratory well in the Swanson River area on the Kenai Peninsula has located a very promising stratum of oil sand. Hopes are high that further drilling will delineate a sizeable oil structure in the area. The oil was drilled on a federal lease and as could be expected, it was followed by an unprecedented rush of oil and gas filings in the Anchorage Land Office."

On June 3, 1958, the President, having been informed of the leasing activity and discovery of oil within the Kenai Moose Range by the reports referred to above, approved and signed the Alaska Submerged Lands Act (72 Stat. 322; 48 U.S.C. 456 and 30 U.S.C. 251), which added

³⁸See 48 U.S.C. 64.

to the leases issued and applications filed in Alaska the water bottoms within their boundaries. In so doing, the President ratified and confirmed the Secretary of the Interior's construction of E.O. 8979 and P.L.O. 487 as leaving the Range open to leasing.

See *Peters v. Hobby* (1955) 349 U.S. 331.

IV

INDISPENSABLE PARTIES WERE NOT JOINED IN THIS SUIT.

Amici urge that this case be decided on the merits, as further delay in settling the titles to the oil and gas leases in the Kenai Moose Range will be extremely detrimental to the interests of all concerned, including the State of Alaska. Amici wish, however, to bring this Court's attention to the serious defect in the administration of justice presented by their absence as parties in this case.³⁹

As stated above, amici hold oil and gas leases on the identical lands which respondents seek to have leased to them. Necessarily, the respondents seek to have the leases of amici canceled by the Secretary. Despite this fact, none of amici and none of those holding overriding royalties or other interests in the leases of amici were named as parties to or given any notice, formal or otherwise, of

³⁹The absence of indispensable parties may and should be raised by the trial court *sua sponte* and when not so raised may be raised by the reviewing court (*Hoey v. Wilson* (1870) 9 Wall. (76 U.S.) 501; *Brown v. Christman* (D.C.Cir. 1942) 126 F.2d 625, 631-632; *Flynn v. Brooks* (D.C.Cir. 1939) 105 F.2d 766, 767-768).

the filing or pendency of this action. In fact, none of the amici learned of the existence of the suit until after the decision of the Court of Appeals herein was handed down on September 19, 1963.⁴⁰

The Court of Appeals said in its opinion that all existing leases within the Moose Range issued on applications filed prior to January 8, 1958, are "nullities," and ordered the Secretary to issue leases to the respondents, acting presumably under the rule laid down by that court in *Barash v. Seaton* (D.C. Cir. 1958) 256 F.2d 714. There the court held that the holder of a Federal oil and gas lease is not an indispensable party in a suit by a junior applicant seeking to compel the Secretary to issue a lease to him. On remand the District Court directed the Secretary to issue leases to the junior applicant.⁴¹ The Secretary promptly thereafter canceled the

⁴⁰Amicus Richfield Oil Corporation did participate in the administrative proceedings in the Interior Department, but was given no notice of and had no knowledge of the filing of the suit.

⁴¹In *Barash* the District Court then filed a memorandum saying (66 I.D. 12):

"From the standpoint of the Court of Appeals, as indicated in its opinion (No. 14069, decided April 25, 1958), it was held that The Texas Company was not an indispensable party, and then the Court went on to say: '... we do not now order cancellation of any of the Secretary's leasing agreements with The Texas Company.' (p. 7) Neither does this Court. Whether or not the order as signed will have that effect in the circumstances may well be so, but that result is not ordered for the very reason that the Court of Appeals, in the circumstances, refused to dispose of the matter.

"It is unfortunate that the Court left the case in this posture, and what the 'further proceedings' consistent with this opinion is, is not clear either from the point of view of this Court or that of counsel. I leave it in the posture in which I find it."

existing lease as a necessary step in compliance with the order of the District Court. Accordingly, the plain legal effect of the Court's decision in the *Barash* case, as construed by the District Court and the Secretary of the Interior, was to cancel the lease of the party not before the Court.

It is respectfully submitted that the ultimate result of the *Barash* case was at fundamental variance with the oft-quoted injunction of this Court in *Shields et al. v. Barrow* (1854) 17 How. (58 U.S.) 129, which defined indispensable parties as (p. 139):

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

and held that (pp. 140-141):

"* * * a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights."

In *Barash* the Court of Appeals relied on *Work v. Louisiana* (1925) 269 U.S. 250. The *Work* case does not support the *Barash* ruling. *Work* held only that homestead entrymen are not necessary parties to a suit by a state to enjoin the Secretary of the Interior from rejecting its claim to certain lands on the ground that the state, as a condition precedent, was required to show that the

lands were not mineral in character. Even if the state had won its limited point, it still would not have established any right to the lands as against the absent entrymen.

Brady v. Work (1924) 263 U.S. 435, is controlling authority. In that case the junior applicant sought to enjoin the Secretary from issuing a patent to a homesteader. In the administrative proceeding the Secretary had held that the homesteader and not the junior applicant was entitled to the land and, thus, the patent. It is clear from the opinion that since the homesteader had been awarded the land, the Court could not act on the claim of the junior applicant without, in fact, adjudicating the homesteader's title. In this situation the homesteader was an indispensable party and the Court stated (263 U.S. at 437).

"Clearly the controversy between the plaintiff and those officers [Secretary and Land Office Manager] involving the granting of a patent to her can not be settled without her presence in court. * * * She is entitled to be heard. Inability to secure service on her because she lives in Arizona can not dispense with the necessity of making her a party."

The soundness of the indispensable party rule is well illustrated by the fact that although respondents cannot possibly establish any right to leases without at the same time attacking the leases held by amici, the Secretary of the Interior is not the representative of his lessees and owes them no duty to represent them in actions such as this.⁴² The Department of Justice pointed out to the court below that "one of the difficulties always presented is

⁴²*Litchfield v. Register and Receiver* (1869) 9 Wall. (76 U.S.) 575.

that we consider it inappropriate for us, on behalf of the Secretary, to urge facts or equities which may favor such a lessee." Thus amici have, in practical effect, been deprived of a number of their leases without ever having had their day in court.

See:

Texas v. Interstate Com. Comm. (1922) 258 U.S. 158;

Calcote v. Texas Pac. Coal & Oil Co. (5 Cir. 1946) 157 F.2d 216;

Alaska Freight Lines v. Weeks (D.D.C. 1955) 18 F.R.D. 64.

We submit that the rule of the *Barash* case is contrary to the adversary principle of our judicial system and should be abrogated.⁴³

⁴³When the *Barash* case was begun, one suing the Secretary of the Interior had to bring suit against him in the District of Columbia (see *Stroud v. Benson* (4 Cir. 1958) 254 F.2d 448, certiorari denied (1958) 358 U.S. 817), where the holder of an existing lease might not be amenable to service. In 1962, 28 U.S.C. 1391 was amended to permit action against Government officials to be brought outside the District of Columbia (76 Stat. 744).

CONCLUSION

The President's 1941 order creating the Moose Range and the Secretary's 1948 order supplementing that order did not close the Range to oil and gas leasing.

The Secretary consistently treated the Range as open to leasing, made known to all that he did so, and treated all applicants for leases therein alike, under governing law.

The Secretary's construction of E.O. 8979 and P.L.O. 487 as permitting the acceptance of applications and the issuance of leases was correct, and has been ratified and confirmed by Congress and the President.

The leases issued within the Moose Range on applications filed prior to January 8, 1958, were and are valid. Respondents therefore are not the first qualified applicants for leases on the lands they seek, and their applications were properly rejected by the Secretary on this ground.

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

ABE FORTAS,

JOSEPH A. BALL,

GORDON A. GOODWIN,

*Attorneys for Richfield
Oil Corporation.*

FRANCIS R. KIRKHAM,

TURNER H. McBAINE,

CLARK M. CLIFFORD,

*Attorneys for Standard Oil
Company of California.*

(Appendix Follows)

Appendix

<u>Serial No.</u>	<u>Date of Filing</u>	<u>Description (Unsurveyed Sections, Township and Range, Seward Meridian)</u>	<u>Name of Applicant</u>
UNACCEPTABLE FILING PERIOD (January 8, 1958 - August 14, 1958)			
043276	5-15-58	Secs. 1, 2, 11 and 12, T. 6 N., R. 9 W.	Christine Fleischer
043277	"	Secs. 3, 4, 9 and 10, T. 6 N., R. 9 W.	James G. Carlson
043018	4-28-58	Secs. 27, 28, 33 and 34, T. 6 N., R. 9 W.	Harry B. Cockrum
043019	"	Secs. 29, 30, 31 and 32, T. 6 N., R. 9 W.	Bailey E. Bell
043027	"	Secs. 25, 26, 35 and 36, T. 6 N., R. 9 W.	James K. Tallman
043028	"	Secs. 5, 6, 7 and 8, T. 6 N., R. 9 W.	Dr. James E. O'Malley
043054	"	Secs. 15, 16, 21 and 22, T. 6 N., R. 9 W.	Lars L. Johnson
043058	"	Secs. 13, 14, 23 and 24, T. 6 N., R. 9 W.	Dr. William O. Rabourn
043088	"	Secs. 17, 18, 19 and 20, T. 6 N., R. 9 W.	Dr. Michael F. Beirne
043090	"	Secs. 2, 3, 10 and 11, T. 6 N., R. 10 W.	Harry B. Cockrum
043092	"	Sec. 2, T. 5 N., R. 5 W.	Bailey E. Bell
MOOSE RANGE SIMULTANEOUS FILING PERIOD			
044842	8-14-58	Secs. 1, 2, 11 and 12, T. 6 N., R. 9 W.	Christine Fleischer
044843	"	Secs. 25, 26, 35 and 36, T. 6 N., R. 9 W.	James K. Tallman
044844	"	Secs. 25, 26, 35 and 36, T. 6 N., R. 10 W.	Alice P. Tallman
044845	"	Secs. 13, 14, 23 and 24, T. 6 N., R. 9 W.	Dr. William O. Rabourn
044846	"	Secs. 27, 28, 33 and 34, T. 6 N., R. 9 W.	Harry B. Cockrum
044847	"	Secs. 29, 30, 31 and 32, T. 6 N., R. 9 W.	Bailey E. Bell
044848	"	Secs. 3, 4, 9 and 10, T. 6 N., R. 9 W.	James G. Carlson
044849	"	Secs. 17, 18, 19 and 20, T. 6 N., R. 9 W.	Dr. Michael F. Beirne
044850	"	Secs. 5, 6, 7 and 8, T. 6 N., R. 9 W.	Dr. James E. O'Malley
045178	"	Secs. 9, 10, 11, 14, 16, 18, 19 and 36, T. 5 N., R. 11 W., S.M.	Waldo E. Coyle

United States Department of the Interior
Office of the Secretary
Washington 25, D. C.

June 13, 1958

Dear Mr. Bell:

Rev. Ofc. Asst. Secy—PLM

Thank you for the comments in your letter of May 19, relating to oil and gas leasing of lands in the Kenai National Moose Range in Alaska.

Since 1947 the oil and gas leasing regulations have provided for development of such mineral deposits on wildlife refuge lands only under certain conditions. On the basis of a study of these leasing procedures, the regulations were amended in December 1955 to exclude oil and gas leasing on certain wildlife areas and to establish adequate restrictions on such leasing in other areas administered for wildlife conservation purposes. The lands within the Kenai National Moose Range were included in the category classified as available for leasing.

However, in view of the fact that many wildlife areas were being administered on a cooperative basis by the Fish and Wildlife Service and other agencies as well as with State game commissions, further study of the entire situation was deemed advisable. The suspension of action on issuance of leases for lands administered for wildlife purposes, which had been in effect since 1953, was continued until further notice.

The regulations which were approved January 8, 1958, have been supplemented by special stipulations which will be a part of any lease issued for lands administered for wildlife purposes. The regulations of January 8 are enclosed for your information. Your attention is directed to the provisions of section 192.9(b)(3) which sets forth the leasing policy and procedure for lands in Alaska wildlife areas, including the Kenai National Moose Range.

While the order of 1953 suspended issuance of leases for lands within wildlife areas, it did not prohibit the filing of offers for such lands. Consequently, all offers filed for lands in the Kenai Moose Range prior to the approval of the regulations of January 8, 1958, have a priority of filing as of the date received in the Anchorage Land Office. Whether such offerors are qualified to receive a lease for the lands applied for will be determined at such time as the offers are reached for adjudication.

An agreement has been reached as to the lands in the Kenai Moose Range which will be closed to leasing. A map of the area showing the inviolate area and the area open to leasing will be published in the *Federal Register*, and ten days after its notation on the records of the Anchorage Land Office, offers will be accepted for the area open to leasing as provided in section 192.9(c) of the enclosed regulations. Offers received for these lands since the approval of the regulations and prior to the tenth day following publication and notation of the agreement will not be accepted for filing. Such offers will be returned to the offeror and will afford the offeror no priority of filing.

Copies of the press releases relating to the special stipulations and to the agreement affecting the Kenai Moose Range are enclosed for your information.

Sincerely yours,

(sgd) Roger Ernst

Assistant Secretary of the Interior

Mr. Bailey E. Bell
Bell, Sanders & Tallman
Attorneys at Law
Central Building
Anchorage, Alaska
Enclosures

United States Department of the Interior
Office of the Solicitor
Washington 25, D. C.

July 24, 1956

Hon. E. L. Bartlett
Delegate to Congress from Alaska
House Office Building
Washington 25, D. C.

My Dear Mr. Bartlett:

This is in reference to your recent inquiry as to whether or not lands in the Kenai National Moose Range of Alaska are subject to oil and gas leasing under the provisions of Executive Order No. 8979, dated December 16, 1941. Executive Order 8979 provides that "None of the * * * lands * * * shall be subject to settlement, location, sale, entry, or other disposition." Therefore, the executive order does not prohibit leasing of such lands on the Moose Range for oil and gas purposes in that a lease as such is not for the purpose of acquiring title to the lands and therefore is not included within the prohibitions.

This decision is in accord with an opinion rendered by the Solicitor of this department on September 30, 1921, wherein it was held that a reservation of lands of the United States from entry, location or other disposal under the laws of the United States did not remove the reserved lands from leasing under the Mineral Leasing Act. This decision of 1921 has been recently reaffirmed in the matter of Noel Teuscher, et al., decided May 31, 1955 (62 I.D. 210 at page 212), a copy of which is attached.

Sincerely yours,
Edmund T. Fritz
Deputy Solicitor

Enclosure

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes, regulations, and orders involved.....	2
Statement.....	3
Summary of argument.....	4
Argument.....	8
I. Executive Order No. 8979 did not close the Kenai Moose Range to leasing under the Mineral Leasing Act.....	8
A. The terms of the executive order did not forbid mineral leasing.....	9
B. Substantially the entire Moose Range has been leased on the premise that the executive order permitted leasing and private rights of great value have be- come vested in reliance on the Secre- tary's interpretation of the order.....	12
C. The leasing practices followed in the area subject to the executive order have been approved by Congress.....	15
D. The regulations and related departmental orders are fully consistent with and con- firm the interpretation of the executive order as not barring mineral leasing....	18
E. Since the Secretary had power to modify the executive order, the defect is at best one of form by which no sub- stantial rights have been prejudiced....	25
II. Public Land Order No. 487 did not bar mineral leasing in the area to which it applied.....	28
III. The decision below should be reversed on the merits without reaching the indispensable- parties question sought to be argued by the <i>amici curiae</i>	31
Conclusion.....	35

Appendix A	Page 1a
Appendix B	11a

CITATIONS

Cases:

<i>Boesche v. Udall</i> , 373 U.S. 472.....	10, 18
<i>Boehme, Earl J.</i> , 62 I.D. 9.....	9
<i>Bourdieu v. Pacific Oil Co.</i> , 299 U.S. 65.....	33
<i>Brady v. Work</i> , 263 U.S. 435.....	33
<i>Brooks v. Dewar</i> , 313 U.S. 354.....	18, 33
<i>Brown v. Christman</i> , 126 F. 2d 625.....	32
<i>Cherokee Nation v. Hitchcock</i> , 187 U.S. 294.....	33
<i>City of Fresno v. California</i> , 372 U.S. 627.....	17
<i>Fleming v. Mohawk Co.</i> , 331 U.S. 111.....	18
<i>Gray v. Powell</i> , 314 U.S. 402.....	11
<i>Haley v. Seaton</i> , 281 F. 2d 620.....	9, 18
<i>Hoe v. Wilson</i> , 9 Wall. 501.....	32
<i>Ivanhoe Irrig. Dist. v. McCracken</i> , 357 U.S. 275.....	17
<i>Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.</i> , 221 F. 2d 464, certiorari denied, 350 U.S. 832.....	32
<i>McLaren v. Fleischer</i> , 256 U.S. 477.....	14
<i>McShan v. Sherrill</i> , 283 F. 2d 462.....	32
<i>Ohio v. Heivoring</i> , 292 U.S. 360.....	33
<i>Rabinowitz v. Kennedy</i> , 376 U.S. 605.....	33
<i>Rochester Telephone Corp. v. United States</i> , 307 U.S. 425.....	11
<i>Securities and Exchange Commission v. Chenery Corp.</i> , 332 U.S. 194.....	11
<i>Teuscher, Noel</i> , 62 I.D. 210.....	9
<i>Unemployment Comm'n v. Aragon</i> , 329 U.S. 143.....	11
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459.....	8, 14
Statutes, regulations, and orders:	
Alaska Submerged Lands Act of July 3, 1958, 72 Stat. 322.....	16-17
Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. 351.....	10
Mineral Leasing Act of 1920 (41 Stat. 437, 443, as amended, 30 U.S.C. 181 <i>et seq.</i>):	
§ 1.....	2, 10, 1a.
§ 17.....	2, 3, 1a
Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141.....	8

III

Statement—Continued

28 U.S.C. 1361.....	34
28 U.S.C. 1391.....	34
Regulations of the Department of Interior:	
43 C.F.R. 192.9.....	2, 18, 21, 3a, 4a, 6a
43 C.F.R. 295.8.....	23
Executive Order No. 8979, 6 F.R. 6471.....	2,
4, 7, 8, 9, 11, 12, 13, 16, 25, 27, 28, 29	
Executive Order No. 9337, 8 F.R. 5516.....	26
Executive Order No. 10355, 17 F.R. 4831.....	25
Public Land Order No. 487, 13 F.R. 3462.....	3,
4, 7, 28, 29, 30, 31, 33, 11a	
Public Land Order No. 1212:	
20 F.R. 6795.....	3, 28, 29, 31, 11a
20 F.R. 7904.....	3, 30, 14a

Miscellaneous:

Advisory Committee, Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure.....	35
Annual Report of the Secretary of the Interior, 1957..	16
Annual Report of the Secretary of the Interior, 1958..	16
BLM Memorandum to Area Administrator, Area 4, August 12, 1955.....	19
102 Cong. Rec. A6581-6583.....	19
104 Cong. Rec. 11836-11838.....	17
Department of Interior Press Releases:	
January 8, 1958.....	16
July 25, 1958.....	23
Developments in the Law, 71 Harv. L. Rev. 879.....	33
12 F.R. 7334.....	2
20 F.R. 9009.....	2
23 F.R. 227.....	2
23 F.R. 5883.....	3, 9a
Federal Rules of Civil Procedure, Rule 12(h).....	32
Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, 84th Cong., 2d Sess.....	15, 19
Hearings before the Senate Committee on Interior and Insular Affairs on H.R. 8054, 85th Cong., 2d Sess..	17
Hearings before the Subcommittee on Merchant Ma- rine and Fisheries of the Senate Committee on Inter- state and Foreign Commerce on S. 2101, 84th Cong., 2d Sess.....	15, 19
H. Rep. No. 1941, 84th Cong., 2d Sess.....	16, 21

Miscellaneous—Continued

	Page
<i>Hoffman, Oil and Gas Leasing on the Public Domain</i> (1951).....	10
Note, 65 Harv. L. Rev. 1030.....	33
Opinion of the Solicitor, 48 I.D. 459.....	9
Opinion of the Solicitor, 55 I.D. 205.....	9
S. Rep. No. 1720, 85th Cong., 2d Sess.....	17

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

**STEWART L. UDALL, SECRETARY OF THE INTERIOR,
PETITIONER**

v.

JAMES K. TALLMAN, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Secretary of the Interior is reported at 68 I.D. 256. The opinion of the court of appeals (R. 82-95) is reported at 324 F. 2d 411.

JURISDICTION

The judgment of the court of appeals was entered September 19, 1963 (R. 96). A timely petition for rehearing was denied October 16, 1963 (R. 99). On January 11, 1964, the Chief Justice extended the time for filing a petition for certiorari to February 6, 1964 (R. 111). The petition for a writ of certiorari was filed on February 6, 1964, and granted on March

30, 1964 (R. 111; 376 U.S. 961). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Executive Order No. 8979 (6 F.R. 6471), providing that none of the lands in a described area "shall be subject to settlement, location, sale, or entry, or other disposition * * * under any of the public-land laws," closed the lands to leasing under the Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq.*) and made invalid oil and gas leases thereafter issued by the Secretary of the Interior on applications filed while the order was outstanding.

2. Whether the Secretary of the Interior's Public Land Order No. 487 (13 F.R. 3462), withdrawing lands "from settlement, location, sale or entry," closed the lands to mineral leasing and made invalid oil and gas leases thereafter issued by the Secretary on applications filed while that order was outstanding.¹

STATUTES, REGULATIONS, AND ORDERS INVOLVED

Sections 1 and 17 of the Mineral Leasing Act of 1920 (41 Stat. 437, 443, as amended, 30 U.S.C. 181, 226); Executive Order No. 8979, 6 F.R. 6471; § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9), as in force from time to time (12 F.R. 7334; 20 F.R. 9009; and 23 F.R. 227); and an order of the

¹ There is also latent in the case the following question (see pp. 34-35, *infra*):

Whether the holder of an oil and gas lease issued by the Secretary is an indispensable party to an action by a subsequent applicant to compel the Secretary to issue a lease to him on the ground that the lease first issued was invalid.

Secretary of Interior issued on August 2, 1958 (23 F.R. 5883) are set forth in pertinent part in Appendix A, pp. 1a-10a, *infra*.

Further orders relevant only to respondent Coyle's claim (Public Land Order No. 487, 13 F.R. 3462; and Public Land Order No. 1212, 20 F.R. 6795, 7904) are set forth separately in Appendix B, pp. 11a-15a, *infra*.

STATEMENT

Between October 15, 1954, and January 28, 1955, D. J. Griffin and other persons filed applications for oil and gas leases on some 25,000 acres of the public domain located within the Kenai National Moose Range in Alaska (R. 38). On August 14, 1958, the respondents filed offers to lease the same lands (R. 38). Acting pursuant to Section 17 of the Mineral Leasing Act of 1920 (App. 1a-2a), which requires leases on lands not within a known geologic structure to be given to the qualified persons "first making application," the Bureau of Land Management of the Department of the Interior issued leases on the tracts, effective September 1, 1958, to the Griffin group of applicants (R. 38). In October 1959, when they were reached for processing, the respondents' applications were rejected on the ground that the lands had been leased to prior applicants (R. 38).

From the rejection of their applications, the respondents appealed to the Director of the Bureau of Land Management (R. 27-36) and then to the Secretary of the Interior (R. 37-45, 71), both of whom affirmed the decision. Respondents thereafter brought this action in the nature of mandamus to compel the Secretary to issue oil and gas leases to them (R.

3-10). The Griffin group, to whom leases on the same lands had previously been issued, were not made parties to the action.

The district court granted summary judgment in favor of the Secretary dismissing the complaint (R. 79-80). The court of appeals reversed (R. 82-95). It held that the Executive Order by which the Moose Range had been created in 1941 (Exec. Order No. 8979, App. 2a) had withdrawn the lands from availability for leasing under the Mineral Leasing Act; that they were not reopened for leasing until August 14, 1958 (as a consequence of a revised departmental regulation); that the applications of the Griffin group, filed while the lands were "closed" to leasing, were ineffective; that the leases granted to them were nullities; and that the respondents, as the persons "first" making application for leases after the lands became available for leasing in 1958, were accordingly entitled to be issued leases on their applications.²

SUMMARY OF ARGUMENT

I

Executive Order No. 8979 of December 16, 1941, creating the Kenai National Moose Reserve in Alaska, did not, in withdrawing the land from "settlement, location, sale, or entry, or other disposition" close the range to leasing under the Mineral Leasing Act. By its own terms the Order relates only to dispositions of

² As to the application by respondent Coyle, the decision was based on Public Land Order No. 487 rather than the 1941 Executive Order. See pp. 28-31, *infra*.

the land and specifically to forms of disposition whereby private persons would obtain fee patents to the land. When oil and gas leases are issued under the Mineral Leasing Act, the land retains its character as public land subject to the management and control of the Secretary of the Interior. In many instances (such as here) oil and gas development is not inconsistent with the purposes for which withdrawals are made. Moreover, because the Secretary retains his discretion to lease or not, the purposes for which the withdrawals are made can be protected. Accordingly, unless the Mineral Leasing Act is specifically mentioned in a withdrawal from disposition it remains applicable.

The Secretary has long and consistently so construed this and similar withdrawal orders and has made regulations and issued leases based on this construction. Since he is entrusted with management and operation of the public lands and the execution of statutes, orders, and regulations pertaining thereto, his construction may not be set aside in a mandamus proceeding such as this unless his action can be characterized as arbitrary and capricious. In the instant case his construction at the very least is reasonable and should not be set aside.

Relying on the consistent and long-standing interpretation and practice of the Secretary, many individuals have applied for and received leases on the Moose Reserve. Many of those leases have been developed at substantial expense to the lessees and at present are producing large quantities of gas and oil. Individuals wishing to develop the resources of the

public lands must operate within the framework established by the Secretary of the Interior. When large investments have been made to establish rights based upon the consistent interpretation and practice of the Secretary, such rights should not be upset by retroactively overturning the interpretation and practices of the Secretary.

The long-standing interpretation and practices of the Secretary, the leases issued on the Kenai Moose Reserve, and the fact that oil had been discovered, were all specifically called to the attention of and received the approval of Congress. Certainly such approval constitutes legislative ratification of the Secretary's interpretation and practice in a field within the scope of the legislative and executive province, which may not be set aside by the courts.

Lending more weight to all of the foregoing is the fact that there is not here involved the question of the Secretary's power. Although the 1941 Order was issued by the President, the authority to modify it was soon transferred to the Secretary of the Interior. Had the Secretary interpreted the Order as did the court of appeals, or known that the court would so interpret it, he could easily have amended the Order and issued the oil and gas leases in exactly the same fashion. Surely a disagreement as to form rather than substance does not justify overturning the consistent practice of the Secretary, approved by Congress, reliance upon which has resulted in large expenditures by innocent third parties.

II

If Executive Order 8979 did not bar mineral leasing, *a fortiori* Public Land Order No. 487 (applicable to the lands sought to be leased by respondent Coyle) did not. That order withdrew the lands only from "settlement, location, sale or entry"—none of which terms includes mineral leasing—and did not include the "other disposition" language relied upon by the court below in its construction of Executive Order 8979.

III

The question whether the lessees were indispensable parties to this action, sought to be argued by the *amici curiae*, was not raised by the Secretary in the lower courts and is not urged here as a ground for reversal. Moreover, because the respondents' claim is in any event without merit and because of the great public interest in removing the doubts created by the decision below as to the validity of the oil and gas leases in the Kenai Moose Range, we urge the Court to reverse the judgment on the merits without passing on the indispensable-parties question argued by the *amici*.

ARGUMENT

I

EXECUTIVE ORDER NO. 8979 DID NOT CLOSE THE KENAI MOOSE RANGE TO LEASING UNDER THE MINERAL LEASING ACT

The Kenai National Moose Range was created in 1941 by Executive Order No. 8979 (App. 2a-3a),* by which some two million acres of the public domain were set aside "as a refuge and breeding ground for moose." The order provided that:

None of the above-described lands excepting [a defined area] * * * shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska,
* * *

The leases in conflict with the applications of nine of the ten respondents were within the area to which that provision applied and were issued on applications filed while the Executive Order was in effect. As to those nine respondents, therefore, the question is whether the quoted provision of the Executive Order closed the lands to leasing under the Mineral Leasing Act of 1920 and made the leases so issued invalid. That question will be considered in this Point. The leases in conflict with respondent Coyle's application

* The President has inherent power to effect such withdrawals. *United States v. Midwest Oil Co.*, 236 U.S. 459. The power was confirmed in part, though not limited, by the so-called Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141-142. The Kenai Range order did not expressly invoke the Pickett Act.

were on land within the area excepted from Executive Order 8979,⁴ and his suit thus presents a different question which will be separately considered in Point II.

A. THE TERMS OF THE EXECUTIVE ORDER DID NOT FORBID MINERAL LEASING

Ever since the adoption of the Mineral Leasing Act in 1920, the Department has consistently characterized oil and gas leasing under that Act as not effecting a disposition of land. It has accordingly held⁵ that an order withdrawing lands from availability for private appropriation does not bar mineral leasing unless it specifically so provides.⁶ As stated by the leading treatise on the topic in 1951, well before the events involved in this case:

* * * Ordinarily, a withdrawal from sale or other disposition of the public domain is no bar to the issuance of a lease, as leasing is not dis-

⁴ References to Executive Order 8979 are to the provision quoted above forbidding settlement, etc., in the specified area, not to the provisions—applicable to a larger area—creating the Moose Range, the latter provisions being of no significance for purposes of this case.

⁵ See, e.g., *Opinion of the Solicitor*, 48 I.D. 459 (1921) ("reserved from entry, location, or other disposal"); *Noel Teuscher*, 62 I.D. 210 (1955) ("withdrawn from settlement, location, sale, or entry"); *Opinion of the Solicitor*, 55 I.D. 205, 211 (1953) ("temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification").

⁶ The Secretary may, of course, conclude that the purpose of a particular withdrawal would be impaired by leasing and for that reason decline to issue leases in the exercise of his discretion. See, e.g., *Earl J. Boehme*, 62 I.D. 9 (1955); *Haley v. Seaton*, 281 F. 2d 620 (C.A.D.C.).

posing of the land. It is merely granting the right to prospect and, upon discovery, to produce oil or gas from the land under prescribed conditions. Title to the land and the minerals therein remain in the United States.* * *

The characterization of oil and gas leasing as not effecting a "disposition" of land for purposes of withdrawal orders is supported by a variety of considerations. In the first place, the interests created by an oil and gas lease under the Act are very limited, consisting essentially of but a right to prospect for oil and gas and then to produce from wells located on the land whatever oil and gas is discovered.⁷ The leasehold interests are quite unlike mining locations, for example, which eventuate in the securing of a fee patent. In the second place—and with peculiar significance in the light of the function of a withdrawal order—oil and gas leasing, unlike outright dispositions of land, is not usually inconsistent with the reservation of lands primarily for other purposes.⁸ Finally, in contrast to private appropriation

⁷ Hoffman, *Oil and Gas Leasing on the Public Domain* (1951), pp. 33–34. Mr. Hoffman was the Chief of the Branch of Minerals of the Bureau of Land Management.

⁸ For the limited nature even of that right, see *Boesche v. Udall*, 373 U.S. 472, 477–478.

⁹ That view is reflected in the Mineral Leasing Act itself, which by its own terms was made fully applicable to lands previously withdrawn for wildlife conservation or other purposes. See Section 1, App. 1a. It is further reflected in the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. 351, providing for oil and gas leasing on lands acquired by various agencies insofar as such leasing would not be inconsistent with the public purposes for which the land was acquired.

of the public domain by settlement, entry or location—in which rights are acquired by autonomous private action (*e.g.*, staking out a location, making a homestead entry, etc.)—the issuance of oil and gas leases always remains subject to the Secretary's discretion. While formal withdrawal of the lands from settlement and the like is essential to prevent rights from being acquired by "adverse" private action, the regulation of oil and gas leasing—to whatever extent is necessary or desirable to prevent interference with the purposes of the withdrawal—can be left to the Secretary's discretion, exercised by regulation or individual determinations, when appropriate. Seen in the light of those considerations and with an appreciation of the basic function of withdrawal orders, the Secretary's interpretation of Executive Order 8979 was, we submit, not only textually permissible but required.

But whether the Secretary's reading of the Executive Order is abstractly the "correct" interpretation is beside the point. The Secretary of the Interior is the officer charged with the administration of the public lands, and it is for him, and not the courts, to say in the first instance what the Order means. So long as there is a reasonable basis for his action and he has not acted capriciously or arbitrarily, the courts may not interfere. See, *e.g.*, *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153-154; *Rochester Telephone Corp. v. United States*, 307 U.S. 125; *Gray v. Powell*, 314 U.S. 402; *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194.

B. SUBSTANTIALLY THE ENTIRE MOOSE RANGE HAS BEEN LEASED ON THE PREMISE THAT THE EXECUTIVE ORDER PERMITTED LEASING AND PRIVATE RIGHTS OF GREAT VALUE HAVE BECOME VESTED IN RELIANCE ON THE SECRETARY'S INTERPRETATION OF THE ORDER

The Department has consistently administered the area subject to Executive Order 8979 on the premise that the Order did not close the area to oil and gas leasing. One lease in the area was issued as early as 1953—five years before respondents had even filed their applications—and by 1957 a total of 36 leases covering 74,986 acres had been issued.¹⁰

Offers covering most of the rest of the area subject to Executive Order 8979 had also been accepted for filing, and initially processed, during the same period. For reasons explained below (pp. 19-24), however, final action on the offers had been suspended pending the issuance of revised regulations imposing new restrictions on oil and gas leasing in wildlife refuges. The regulations were issued on January 8, 1958 (App. 5a-9a), and an implementing order specifically applicable to the Kenai Range was issued on August 2, 1958 (App. 9a-10a). Their effect was to forbid mineral leasing altogether in the southern half of the Range and to require new restrictions to be included in leases issued in the northern half. Promptly after their issuance, the pending applications were acted upon and 302 leases covering 663,281 acres were issued in the area subject to Executive Order 8979, among them being the leases issued to the Griffin group and held invalid by the court below.

¹⁰ The leasing data summarized here is based on a survey of the records of the Anchorage land office.

In the area subject to Executive Order 8979, therefore, the Secretary has issued a total of 338 leases covering 738,267 acres on applications filed prior to 1958 "*i.e.*, during the period respondents contend, and the court of appeals held, the area was closed to leasing. The area so leased constitutes substantially the whole of the 1941 withdrawal on which leasing was not forbidden by the 1958 regulations. In short, the Secretary had substantially *completed* the leasing of the entire area involved well before this suit, questioning for the first time his authority to issue such leases, was even begun.

The lessees (and their assignees) have in turn expended large sums, of the magnitude of tens of millions of dollars, in the development of the leases thus issued. A major oil strike was made in 1957 in the Swanson River Unit—located entirely in the area allegedly "closed" to leasing by Executive Order 8979—and other discoveries have since been made. The production to date has already been substantial (in the magnitude, again, of tens of millions of dollars), and the Geological Survey of the Department of Interior estimates that the proven reserves of oil and gas subject to the leases have a value ranging from \$750 million to over \$1 billion.¹²

¹² The figures given here, it should be emphasized, are limited to the leases issued in the area withdrawn from settlement by Executive Order 8979. Unlike the figures given in the petition (Pet. 10-11), they do *not* include the leases issued in the part of the Moose Range excepted from the Executive Order's withdrawal provisions.

¹³ Those estimates include some reserves in the area excepted from Executive Order 8979 (the status of which is discussed

The reasons for not disturbing an administrative construction that has been so extensively implemented and relied upon in the conduct of the public business are manifest. As this Court said in *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473:

It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Here, as in *McLaren v. Fleischer*, 256 U.S. 477, 481, the construction was adopted “before the present controversy arose or was thought of * * *, [m]any outstanding titles are based upon it and much can be said in support of it.” What is involved is not simply an abstract principle of deference to the greater expertise of an administrative agency but the security of the title of hundreds of persons who have dealt with the agency in reliance upon its interpretation of its own regulations. In such circumstances, we sub-
in Point II, *infra*), but by far the larger part of the proven reserves are within the area subject to that Order (primarily, the Swanson River field).

mit, only the grossest abuse of power could justify a court in rejecting the administrative construction and declaring invalid the long course of action based upon it.

C. THE LEASING PRACTICES FOLLOWED IN THE AREA SUBJECT TO THE EXECUTIVE ORDER HAVE BEEN APPROVED BY CONGRESS

In early 1956, the appropriate committees of Congress had under consideration proposals to restrict mineral leasing in wildlife refuges. During the hearings, representatives of the Department advised the committees, *inter alia*, of the leases that had been issued in the Kenai Moose Range.¹³ No question was raised as to the power of the Secretary to issue such leases and the only issue was whether the power should be restricted by statute.¹⁴ Neither committee favorably reported the bills. Instead, the House Committee submitted a report reciting an interim arrangement

¹³ Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., pp. 135, 141, 147; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92-98.

¹⁴ The bill as introduced only forbade the Secretary to "dispose of" lands in wildlife refuges, and a question arose in the hearings whether that language would apply to the issuance of oil and gas leases. The Department representatives asserted, without contradiction, that a granting of an oil and gas lease was not a "disposition" and would not be affected by the language as it stood. An amendment was accordingly proposed specifically restricting oil and gas leasing. See Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., p. 98; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 66-70.

that had been agreed upon under which the Secretary would submit to the Committee for its advance approval or disapproval any proposed leasings in wildlife refuges. H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12-13.

On June 29, 1956, pursuant to the agreement, the Department submitted to the House Committee on Merchant Marine and Fisheries a proposal to issue 30 leases covering 71,680 acres in the area withdrawn by Executive Order 8979, to be operated as the Swanson River Unit. After a public hearing, the Chairman of the Committee, by letter dated July 25, 1956, advised the Department that the Committee was in unanimous agreement that the leases would not be detrimental to wildlife uses and should be issued.¹⁵ The leases were then issued and it was under them that the first discovery of oil (in July 1957) in the Kenai Range was made.¹⁶ In approving the issuance of those leases, the Committee necessarily agreed that Executive Order 8979 did not bar mineral leasing.

Congressional approval of the leasing activities in the Kenai Range was not limited to informal committee advice and legislative inaction. The "Alaska Submerged Lands Act" of July 3, 1958, 72 Stat. 322, authorized for the first time the granting of oil and gas

¹⁵ Letter dated July 25, 1956, Chairman Bonner, Committee on Merchant Marine and Fisheries to Director, Fish and Wildlife Service, attached to Department of the Interior Press Release, January 8, 1958.

¹⁶ The discovery and the leasing activities were, of course, also reported to the President. Annual Report of the Secretary of the Interior, 1957, pp. 279, 356; id., 1958, pp. 104, 199, 258, 321.

leases on inland navigable waters in Alaska. Section 6 gave existing lessees (and those with pending offers) a preference right to have their leases (or applications) expanded to include any navigable waters within their boundaries. The history of that provision shows that one of the specific purposes was to protect the holders of producing leases in the Kenai Range (i.e., the leases granted in 1956 in which oil had been discovered in 1957) against leases being given to other persons on navigable waters overlying the oil and gas deposits that had been discovered and developed by them. It was adopted with full knowledge of the leasing activities that had taken place in the Kenai Range and of the intention of the Department to continue issuing leases on the large number of pending applications,¹⁷ and the committee report expressly referred to the producing leases on the Kenai Range (the most important producing leases in Alaska) as among those meant to be augmented by the inclusion of navigable waters.¹⁸ Thus, Congress not only regarded the outstanding leases as validly issued but, acting on that belief, provided for their enlargement in protection of the leaseholders' interest. "Such a record constitutes ratification of administrative construction, and confirmation and approval" of the Secretary's consistent practice based upon his interpretation of the 1941 Executive Order. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 293; *Boesche v. Udall*, 373 U.S. 472, 483; *City of Fresno v.*

¹⁷ See Hearings before the Senate Committee on Interior and Insular Affairs on H.R. 8054, 85th Cong., 2d Sess., pp. 19-20, 24-25, 32, 76-77, 93-94; 104 Cong. Rec. 11836-11838.

¹⁸ S. Rep. No. 1720, 85th Cong., 2d Sess., pp. 3, 5-6.

California, 372 U.S. 627; *Fleming v. Mohawk Co.*, 331 U.S. 111, 116, 119; *Brooks v. Dewar*, 313 U.S. 354, 361.

D. THE REGULATIONS AND RELATED DEPARTMENTAL ORDERS ARE FULLY CONSISTENT WITH AND CONFIRM THE INTERPRETATION OF THE EXECUTIVE ORDER AS NOT BARRING MINERAL LEASING

Even when withdrawn lands remain subject to leasing under the withdrawal orders, it is established that the Secretary has discretion to decline to issue leases, or to impose conditions on them, when necessary to prevent interference with the purposes for which the withdrawal was made." The regulations establishing the leasing policies to be followed in wildlife refuges are an exercise of that power. Starting with the basic "multiple-use" policy followed by the Department in the administration of the public lands, they seek, by appropriately limiting or conditioning the grant of leases in wildlife refuges, to accommodate the two ends of protecting wildlife while fostering mineral development. The advocates of development and the advocates of conservation have, needless to say, differing views about how the balance is to be struck, and the development of the regulations, with the interim "suspensions" of final action on pending lease applications, reflects simply the continuing process of accommodating the opposing interests.

The regulation specifically governing oil and gas leasing in wildlife refuges (43 C.F.R. 192.9) was first adopted in 1947. In its original form (App. 3a), it provided simply that leases in wildlife refuges must

¹⁹ E.g., *Haley v. Seaton*, 281 F. 2d 620 (C.A.D.C.).

be subject to an approved unit plan and must require the advance consent of the Secretary to any drilling or prospecting. On August 31, 1953, the Director of the Bureau of Land Management advised all regional administrators that "a possible revision of policy and regulations" on leasing in wildlife refuges was being studied and directed them in the meantime to "suspend action on all pending oil and gas lease offers" within such refuges. The direction was given by an internal, unpublished, memorandum and amounted simply to instructions given to subordinates on the action to be taken by them pending further advice. It in no way purported to, or did, prevent the issuance of leases with the approval of the national office, and leases on a number of different refuges (including the Kenai Range) were in fact issued during the so-called "suspension" period.²⁰ *A fortiori*, the unpublished memorandum in no way prevented the continued filing of lease offers on lands otherwise available for leasing.²¹ It was during this period that the Griffin applicants filed their offers.

²⁰ See p. 12, *supra*; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92-93; Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong. 2d Sess., pp. 142-146; 102 Cong. Rec. A6581-6583 (August 20, 1956).

²¹ That was made explicit in a subsequent memorandum from the Bureau to an Area Administrator, advising him that the 1953 memorandum did not "prevent the filing of new offers" and that all pending applications would "preserve their priority." BLM memorandum to Area Administrator, Area 4, August 12, 1955.

On December 8, 1955, the anticipated revision of the refuge-leasing regulation was promulgated. The new regulation (App. 3a-5a) was much more restrictive and gave increased power to the Fish and Wildlife Service to regulate or veto refuge mineral development. It listed in an Appendix A a number of refuges (not including Kenai) in which no leasing at all would be permitted because of their importance to the preservation of rare species of plant or animal life. It then listed in Appendix B certain areas (including a small part of the Kenai Range) in which the Fish and Wildlife Service had determined that leasing, unless closely regulated, would jeopardize conservation purposes. In such areas, leasing was to be permitted only upon the approval by the Director of the Service of a "complete and detailed operating program for the area." In all other wildlife areas, the regulation provided, "Oil and gas leases may be issued" provided they contained specified conditions requiring approval by the Service of the type of prospecting conducted and requiring adoption of a unit plan approved by the Service. The main significance of the 1955 regulation for present purposes is that, by expressly including a part of the Kenai Range in the areas available for leasing only upon approval of a detailed operating plan and by impliedly including the rest of the Range in the third category, it necessarily assumed and confirmed the preexisting availability of the Range for leasing under the 1941 withdrawal order.

The 1955 regulation had the effect of terminating the prior "suspension" of leasing that had been di-

rected pending its adoption. However, upon the almost immediate introduction in Congress of bills further to restrict leasing in wildlife refuges, upon which hearings were begun in January and February 1956,²² the field offices were directed to continue to withhold final action on lease applications,²³ and study of the leasing policy was resumed. Once again, of course, the "suspension" consisted simply of operating instructions to subordinates and, with appropriate internal (and sometimes Congressional²⁴) approval, a significant number of leases on refuge lands (including Kenai) continued to be issued.

The final result of the controversy over the leasing policies to be followed in wildlife refuges was the adoption, on January 8, 1958, of a second complete revision of the regulation. The new regulation (App. 5a-9a) was a major victory for the conservationists. It prohibited oil and gas leasing in most wildlife refuges altogether,²⁵ giving "sole and complete" jurisdiction over them to the Fish and Wildlife Service. The only exceptions (as to exclusively federal lands) were (1) lands withdrawn for a dual purpose (grazing and forage as well as wildlife conservation) and (2) wild-

²² See Hearings cited in note 20, *supra*.

²³ Short-term interim suspensions were first directed by various interdepartmental communications. Then on March 30, 1956, the Bureau of Land Management by teletype directed that the suspension be continued until further notice, explaining that "This does not suspend all preliminary action which should continue to be taken. The suspension applies only to final actions in such matters."

²⁴ See pp. 15-16, *supra*; H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12-13.

²⁵ Unless leasing was necessary to prevent draining, 43 C.F.R. 192.9(b)(2).

life refuges in Alaska. As to such lands, moreover, the Bureau of Land Management and the Fish and Wildlife Service were to reach agreements specifying the areas which "shall not be subject to oil and gas leasing" and the stipulations required to be included in leases issued on the remaining areas. The agreements were to become effective upon approval by the Secretary and publication in the Federal Register. The regulation further provided that "Lease offers for such lands will not be accepted for filing [i.e., new lease offers] until the tenth day after the agreements * * * are noted on the land office records" and that "All pending offers or applications heretofore filed * * * will continue to be suspended until" the conclusion of the agreements.

Pursuant to the regulation, there was published in the Federal Register on August 2, 1958, an order of the Secretary announcing the agreement reached with respect to the Kenai Moose Range (App. 9a-10a). The order decreed that certain lands within the Range (essentially, the southern half) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." It then provided:

The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers * * *. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation * * * will now be acted upon and adjudicated in accordance with the regulations.

* * * lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office * * *.[²⁶]

The agreement was noted in the Anchorage land office on August 4, 1958, and the respondents filed their applications on the tenth day after that, August 14, 1958.²⁷ Shortly after the order was issued, the Department, as announced, began processing the already-pending offers that had previously been suspended. Effective September 1, 1958, it granted leases on the lands in suit to the Griffin applicants on the basis of their offers that had been pending since January 1955. When in due course the new offers filed on August 14, 1958, were reached for adjudication, the re-

²⁶ The Secretary recognized that most of the area had already been filed upon and that in fact there would be little left available for new applicants. In announcing the order, he said: "Most of these lands are now covered by applications that will be adjudicated under the regulations of the Department." Department of Interior Press Release, July 25, 1958.

²⁷ The order, to avoid a race to the land office, provided that all offers filed within ten days after filing was permitted (i.e., during August 14-24) would be treated "as having been filed simultaneously." Under the regulations, priority as among simultaneously-filed offers is to be determined by a drawing. 43 C.F.R. 295.8. In the drawing later conducted among the offers filed during the period August 14-24, the respondents' applications were the first drawn covering the land in suit, and they accordingly acquired a priority date as of August 14, 1958, and ahead of any other offers filed during that period. Their applications remained, of course, junior to any valid applications that had been previously filed and were already pending.

spondents' offers were, as noted in the Statement, rejected on the grounds of the prior leasing.²⁸

From the terms and evolution of the regulations, it is evident that they have consistently taken as their premise that the wildlife refuges to which they applied—specifically including the Kenai Moose Range—were fully subject to mineral leasing under the withdrawal orders by which they were created. Their province has been to *restrict* the leasing activities otherwise permissible, with each version of the regulations prohibiting leasing altogether on larger and larger areas of refuge lands. For the court of appeals to hold, as it did, that the 1958 revision of the regulation (and the implementing order of August 2, 1958) “opened” the northern half of the Moose Range to leasing for the first time is thus a remarkable inversion: what the 1958 regulation and order did was, not to *open* the northern half of the Range, but to *close* the southern half.

The real significance of the regulations lies simply in their confirmation that the Department has from

²⁸ The circumstance that the lands had already been leased before the drawing was held among the offers “simultaneously” filed on August 14–24, 1958 (see note 27, *supra*), apparently thought bizarre by the court of appeals, is not unusual. Lease offers are processed in the order of filing and leases are issued as soon as an acceptable offer is reached. The pending lease offers were therefore acted upon before there was any occasion to examine the offers filed after August 14, 1958. The only purpose of the drawing later held, in turn, was to establish the order in which the offers “simultaneously” filed on August 14–24 would be processed. They could hardly have been processed (to see whether they conflicted with previously-issued leases) before the order of processing was established (*i.e.*, before the drawing).

the beginning construed Executive Order 8979 as not barring mineral leasing and has acted consistently with that construction throughout the period involved here. The 1955 regulation confirmed that understanding by its express mention of the Kenai Range, and the 1958 regulation (and its implementing order) even more pointedly confirmed it by specifically directing the resumption of processing of lease offers previously filed on the Kenai Moose Range. The regulation constitutes, in short, a formal reaffirmation of the consistent administrative construction—repeatedly acted upon by the Department, repeatedly relied upon by the lessees, and repeatedly endorsed by Congress—that Executive Order 8979 did not forbid mineral leasing.

E. SINCE THE SECRETARY HAD POWER TO MODIFY THE EXECUTIVE ORDER, THE DEFECT IS AT BEST ONE OF FORM BY WHICH NO SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED

What has thus far been said would be controlling even if the question in this case went to a statutory or other limitation on the Secretary's power. In fact, the question here goes only to a matter of form. Admittedly, no statutory limitation is involved. And, while the 1941 withdrawal order was issued by the President, thus suggesting the presence of Presidentially imposed limitations, the President soon completely rid himself of the function and delegated to the Secretary the full power to withdraw lands or to modify or revoke any existing withdrawals.²⁹ With

²⁹ Executive Order No. 10355 (17 Fed. Reg. 4831), issued in 1952, delegated to the Secretary authority, by public land orders, "to withdraw or reserve lands of the public domain

that delegation of functions, the Secretary acquired plenary power over the status of the Range, and the 1941 Executive Order became, for all practical purposes, the Secretary's own order.

The question, then, is not one of power at all, but solely one of the Secretary's interpretation of his own order—that is to say, of words he had the power to change at will. No interests had become vested in reliance upon some other meaning of the words, and the Secretary's construction of them was of long standing, was open and notorious, was acquiesced in by Congress, was reflected in the regulations, was acted upon repeatedly, and was relied upon by innocent lessees in the investment of millions of dollars. Had the Secretary been able to foresee the court of appeals' ruling, he could readily have modified the order prior to the events in question to remove any doubt. He did not, only because to him its meaning was clear. In those circumstances, we submit, the construction followed by the Secretary in practice became a controlling gloss on the words. The Secretary had and in fact exercised the power to lease the Range during 1953–1957, and his alleged misuse of words in doing so, by which no rights were prejudiced, is simply beside the point. And surely a grammatical “error” by the Secretary in construing words he has the power to change, affecting no other

and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.” That order replaced a somewhat more limited delegation made in 1943. See Executive Order No. 9337, 8 Fed. Reg. 5516.

substantial interests, cannot justify sacrificing the vested rights acquired by hundreds of innocent persons in reliance on his construction.

There have been few occasions, we submit, in which a court has invalidated so extensive a course of administrative action and caused so serious a dislocation of vested rights with so little justification. There is but one fact which makes the court of appeals' decision understandable: in originally deciding the case, it was wholly uninformed—indeed, misinformed—as to the leasing and development that had taken place in the Range. The respondents' brief in the court of appeals stated as a fact that "No leases issued for any lands within the Kenai Range between 1941 and 1958" (Br. 30) and, with equal certitude, that "the discovery of oil on the Kenai Peninsula in July of 1957" and the resulting "increased activity" in the filing of lease applications "were in areas of the Peninsula outside of the Kenai National Moose Range" (Br. 40). Those erroneous statements³⁰ were unfortunately not corrected by the government's brief, and the court of appeals proceeded to decide the case under a serious misapprehension as to facts of the greatest significance. The court of appeals' failure to accord proper respect to the administrative practice was thus attributable to the

³⁰ If a concession be needed to establish a geographic fact, it may be found in the Brief in Opposition (pp. 8, 14-15), where respondents admit that the Swanson River Unit, leased in 1956 and on which the July 1957 oil discovery was made, was located in the area withdrawn from settlement by Executive Order 8979 and offer a wholly different (but equally erroneous, see Reply Br. 2-5) explanation for the leasing.

simple fact that it did not know about the practice." Once the facts are known and appreciated, respondents' whole case—at best, a quibble over the use of words—collapses.

II

PUBLIC LAND ORDER NO. 487 DID NOT BAR MINERAL LEASING IN THE AREA TO WHICH IT APPLIED

Alone among the ten lease applications involved in this case, respondent Coyle's application was on land located in the part of the Moose Range which was excepted from Executive Order 8979. Most of the area so excepted, however, including the lands filed on by respondent Coyle, was subsequently withdrawn from settlement by Public Land Order No. 487 (App. 11a), and an order issued by the Secretary of Interior in 1948. Public Land Order 487 provided that:

* * * the public lands within the following-described areas are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation: * * *

That order was revoked on September 9, 1955, by Public Land Order No. 1212 (App. 11a-14a), but the leases in conflict with respondent Coyle's application were issued (in 1958) on applications filed while the order was outstanding. The issue raised by re-

³¹ In connection with the petition for rehearing and the motion for reconsideration, the court was told of the extensive leasing and development that had taken place, but the correction apparently came too late, for the court refused to reconsider the case.

spondent Coyle, therefore, is whether Public Land Order 487 closed the area to which it applied to mineral leasing, rendering invalid any applications filed while it was outstanding. That question differs from that of the effect of Executive Order 8979, discussed in Point I, in only two respects, and the discussion may accordingly be limited to those two points of difference.

1. The first difference is in the language of the two orders. Since Public Land Order 487 did not contain the "other disposition" language relied upon by the court below in interpreting Executive Order 8979—and since the granting of an oil and gas lease is plainly not a "settlement," a "location," a "sale," or an "entry"—there is even less basis in its language for the court's holding that Public Land Order 487 barred mineral leasing.

2. The second difference is the confusion about the effect of Public Land Order 487 created by the terms of the order revoking it. As to the bulk of the lands withdrawn by Public Land Order 487, Public Land Order 1212 provided that the revocation would not become effective "to change the status" of the lands until a prescribed date, and on that date the lands would become subject for a 91-day period to settlement under the homestead laws by veterans or other persons with preference rights (14, App. 12a-13a). Paragraphs 6 and 7 of the order then provided (in the language of paragraph 6) that:

Any of the lands * * * then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be

authorized by the public-land laws, including the mineral leasing laws, * * * at 10:00 a.m. on the [day following the expiration of the 91-day period]. All applications filed either at or before 10:00 a.m. of such * * * day, including applications under the mineral-leasing laws, shall be treated as though simultaneously filed at the hour specified on such day. * * *

[Emphasis added.]

In purporting to fix a date on which the lands would "become" subject to mineral leasing, the order seemed to be based on the premise that the lands had not been available for leasing under Public Land Order 487. That premise was, of course, directly contrary both to the Department's consistent interpretation of such withdrawal orders and to its actual leasing practices in the area." Fortunately, the error was promptly perceived, and on October 14, 1955—a bare 35 days after it was promulgated and before it had gone into effect—Public Land Order 1212 was amended to delete the references to mineral leasing in the quoted provision (App. 14a-15a).

One need have only a passing familiarity with human institutions to know that an acknowledgment and correction of an error receives far more careful and deliberate attention than do the myriad details of a long and complex order. The significant thing about that episode, then, is not that the error was made but that it was so unequivocally and promptly corrected, affording a dramatic reaffirmation of the

²² Lease applications covering substantially the whole area had been accepted for filing, and two leases had actually been issued, while Public Land Order 487 was outstanding. On lease applications filed during that period, the Department has now issued a total of 71 leases covering 124,251 acres.

Secretary's consistent interpretation of Public Land Order 487—his own order—as not forbidding mineral leasing.”

III

THE DECISION BELOW SHOULD BE REVERSED ON THE MERITS WITHOUT REACHING THE INDISPENSABLE-PARTIES QUESTION SOUGHT TO BE ARGUED BY THE AMICI CURIAE

As noted in the petition for certiorari (pp. 17-20), there is latent in this case a question whether the Griffin lessees and their assignees were indispensable parties in whose absence the action should have been dismissed. That question was not raised by the Secretary either in the district court or in the court of appeals, but it was sought to be raised on petition for rehearing in the court of appeals—and presumably will be argued here—by the assignees of the lessees who are seeking leave to file briefs as *amici curiae*.

²³ The court of appeals also quoted another provision of Public Land Order 1212 (§ 2, App. 12a) which made a permanent withdrawal for recreation purposes of a small part of the area that had been temporarily withdrawn by Public Land Order 487 (R. 84). The language of that withdrawal—“withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws”—is quoted presumably to emphasize, by way of contrast with Public Land Order 487, its specific exception of the mineral-leasing laws. But while specificity is always preferable, the fact that some withdrawal orders are explicit in permitting mineral leasing (as some are explicit in forbidding it) does not answer the question of the effect of an order that is silent on the matter.

Whether or not technically barred from doing so," the Secretary, having failed to object to the lack of indispensable parties in either of the lower courts, does not now urge reversal of the judgment below on that ground and—to the extent that the requirement is for the benefit of the defendant—waives any objection to the failure to join the lessees as parties. We offer, in addition, the following reasons why the Court should, if possible, dispose of the case on the merits without noticing the indispensable-parties question argued by the *amici*:

First, the question on the merits, as we have shown, so clearly requires dismissal of the respondents' complaint that the relatively more troublesome question of indispensable parties²⁵ need not be considered. The

²⁵ See Rule 12(h), Fed. R. Civ. P.; *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F. 2d 464, 467 (C.A. 2), certiorari denied, 350 U.S. 832; but cf. *Hoe v. Wilson*, 9 Wall. 501; *McShan v. Sherrill*, 283 F. 2d 462 (C.A. 9); *Brown v. Christman*, 126 F. 2d 625, 631 (C.A.D.C.).

²⁶ Having commented on the indispensable-parties question in the petition, we should note that further study indicates that the question is significantly more complicated than our summary treatment of it there suggests. The view that any person whose interests are importantly affected by a decision must always be made a party is too simplistic, and is belied, for example, by the universal, and never challenged, practice of naming only the agency as the party respondent in proceedings to review orders of administrative agencies, with the interests of the beneficiaries of the challenged orders being represented, unless they move affirmatively to intervene, by the agency. A more discriminating judgment is required, taking into account such factors as the identity of the interests of the present and the absent parties, the nature of the proceedings and of the absent party's interest (perhaps distinguishing, e.g., between a

defect, if any, does not go to the power of the Court to deal with the subject matter, and therefore to the propriety of expressing an opinion on the merits. The situation is similar to *Bourdieu v. Pacific Oil Co.*, 299 U.S. 65, 70, where this Court observed:

Since, plainly, the bill of complaint did not state a cause of action, the United States could have no interest in the case requiring its presence as a party; and the inquiry as to whether it was an indispensable party, which would have been entirely proper under a good bill, was here wholly gratuitous.

For other instances in which the Court has passed over threshold "jurisdictional" questions and disposed of a case on the merits, see *Rabinowitz v. Kennedy*, 376 U.S. 605; *Ohio v. Helvering*, 292 U.S. 360, 368; *Brooks v. Dewar*, 313 U.S. 354, 360. The reasons for doing so are, of course, even stronger when the jurisdictional question has not been raised in, or considered by, the courts below.

Second, it is of great importance that the question on the merits be promptly resolved. By declaring to be a "nullity" any oil and gas lease issued in the circumstances involved here—a category including leases to 862,000 acres*—the decision below has cast in license and an interest in property), and the like. Compare, e.g., *Brady v. Work*, 283 U.S. 435, with *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300; see generally, Note, 65 Harv. L. Rev. 1050; Developments in the Law, 71 Harv. L. Rev. 879-887, and authorities there cited.

* 738,267 acres in the area subject to Executive Order 8979 (p. 13, *supra*) and 124,251 acres in the area subject to Public Land Order 487 (p. 30, n. 32, *supra*). The total of about 917,000 acres given in the petition (Pet. 10-11), included some

doubt the validity of the leases under which substantially all of the oil and gas production in Alaska is now taking place and seriously disrupted the further orderly development of the petroleum resources in the Kenai Moose Range. It was for that reason that we sought, and presumably that the Court granted, certiorari, and it would be unfortunate indeed were this case now to be sidetracked on the indispensable-parties question and leave unsettled the status of the leases covering that vast area of oil-rich lands.

Third, recent developments may limit the importance of a decision of the indispensable-parties question in the posture in which it is presented in this case. At the time it was brought, this suit could be brought only in the District of Columbia, so that it was not possible to join the lessees as parties. Under 28 U.S.C. 1361 and 1391, added in 1962, however, such actions may in our view now be brought in, among other places, the district in which the lands are situated, which would greatly alleviate that problem.²⁷ In addition, the Advisory Committee on the Rules has recently issued a preliminary draft of pro-

55,000 acres located in a small part of the Range that was not subject to the withdrawal provisions of either order and was thus unaffected by the decision.

²⁷ The venue provision, 28 U.S.C. 1391, is in terms applicable only to cases "in which each defendant is an officer or employee of the United States", but that limitation can and should, we think, be interpreted as being satisfied if the only person against whom *relief* is sought is the government official. Certainly there is nothing in the history of the Act to suggest a purpose to prevent the joinder of persons whose interests are consequentially affected but against whom no relief is sought.

posed amendments to the Federal Rules of Civil Procedure which would substitute for the present Rule 19 a totally new provision governing absent parties whose interests would be affected by a judgment and would also amend Rule 12 to conform with that change. See Advance Sheet, 328 F. 2d No. 4, pp. 48-50, 55-59. The result would be to change the existing law governing indispensable parties and to give district courts, and presumably courts of appeals, greater flexibility to deal with situations in which absent parties may be affected by a judgment. Under these circumstances, a decision of the indispensable-parties question in the context of this case would likely be of limited precedential value.

For those reasons, we urge the Court, if possible, to dispose of the case on the merits and not notice the indispensable-parties question argued by the *amici* but not preserved by the Secretary in the courts below.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

ROGER P. MARQUIS,
EDMUND CLARK,
Attorneys.

AUGUST 1964.



APPENDIX A

STATUTES, ORDERS, AND REGULATIONS INVOLVED

1. STATUTES

Sections 1 and 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by 60 Stat. 950 (30 U.S.C. 181, 226):

SEC. 1. Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. * * *

SEC. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified

bidder by competitive bidding * * *. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under said sections shall be entitled to a lease of such lands without competitive bidding. * * *

2. EXECUTIVE ORDER

Executive Order No. 8979, December 16, 1941
(6 F.R. 6471):

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the herein-after-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:

* * * * *

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws appli-

cable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: * * *

3. REGULATIONS AND IMPLEMENTING ORDER

a. As originally issued on October 29, 1947 (12 F.R. 7334), § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9) provided:

§ 192.9 *Leases for wildlife refuge lands.* No noncompetitive oil and gas lease under the act will be issued for lands within a wildlife refuge (a) unless those lands are subjected to an approved cooperative or unit plan, and (b) unless the lease contains a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish and Wildlife Service. Subject to the same two conditions, competitive leases also may issue for refuge lands. Even if these conditions are not met, competitive leases may nevertheless issue if Fish and Wildlife Service reports that oil and gas development may be conducted without destroying the usefulness of the lands as a sanctuary for wildlife, or, in the absence of such a report, wherever the Secretary determines that the national interest in securing the contemplated oil and gas production outweighs the importance of maintaining the refuge as a sanctuary for wildlife.

b. As revised on December 8, 1955 (20 F.R. 9009), § 192.9 of the Regulations provided:

§ 192.9 *Leasing of wildlife refuge lands.*

(a) Geological and geophysical prospecting permits may be issued by the Fish and Wildlife Service on areas subject to its jurisdiction prior to leasing under such terms and conditions as that Service may prescribe.

(b)(1) Areas determined to be indispensable for the preservation of rare or endangered species, remnant big-game herds, and irreplaceable examples of unique animal or plant ecology are not available for leasing. Areas in this category at present are included in Appendix A. Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

(2) The following conditions shall be expressed in any lease issued under this section:

(i) Geological and geophysical prospecting conducted on the leased premises shall be of a type and at a time satisfactory to the Fish and Wildlife Service.

(ii) No drilling operations shall be conducted under the lease until such lease has been com-

mitted to an approved unit plan. However, the Secretary may, in his discretion, permit or require drilling if he determines that a unit plan including the leased area cannot be secured and that drilling is necessary to protect the interests of the United States.

(a) A unit agreement which includes lands administered for wildlife conservation shall contain a provision that no drilling operations may be conducted on the unitized portion of the Government-leased lands administered for wildlife conservation without the consent and approval of the Fish and Wildlife Service as to the time, place, and nature of such operations.

(b) In every instance, a plan of development which includes lands administered for wildlife conservation shall not be approved without the concurrence of the Fish and Wildlife Service.

(iii) Lessees shall observe and comply with all State and Federal laws and regulations relating to wildlife and shall take such action as is necessary to assure observance and compliance with these laws and regulations by lessees, employees and agents.

APPENDIX A—FISH AND WILDLIFE SERVICE LANDS NOT AVAILABLE FOR LEASING

APPENDIX B—FISH AND WILDLIFE SERVICE LANDS AVAILABLE FOR LEASING UNDER A SATISFACTORY DEVELOPMENT AND OPERATING PLAN

Kenai: The following areas and all lands within one mile of Tustumena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

c. As revised on January 8, 1958 (23 F.R. 227) and

now in force (43 C.F.R. 192.9 (1963)), § 192.9 of the Regulations provides:

§ 192.9 Leasing of wildlife refuge lands, game range lands and coordination lands—(a)

Definitions—(1) Wildlife refuge lands. Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(2) Game range lands. Game ranges created by a withdrawal of public lands and reserved for dual purposes, namely protection and improvement of the public grazing lands and natural forage resources and conservation and development of natural wildlife resources, are under the joint jurisdiction of the Bureau of Land Management and the United States Fish and Wildlife Service.

(3) Coordination lands. These lands are withdrawn or acquired by the Government and made available to the States by cooperative agreements entered into between the United States Fish and Wildlife Service and the game commissions of the various States, in accordance with the act of March 10, 1934 (48 Stat. 401), as amended by the act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the United States Fish and Wildlife Service as the custodial agency of the Government.

(4) *Alaska wildlife areas.* Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service.

(b) *Leasing policy and procedure.* (1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (2) of this paragraph.

(2) In instances where it is determined by the Geological Survey that any of the lands mentioned in paragraph (a)(1), or any of the lands mentioned in paragraph (a)(2), (3) and (4) of this section and defined in this section as not available for leasing are subject to drainage, the Bureau of Land Management, with the concurrence of the United States Fish and Wildlife Service, will process an offering inviting competitive bids in accordance with the then existing regulations relating to competitive oil and gas leasing. Such leases shall be issued only upon approval by the Secretary of the Interior and shall contain such stipulations as are necessary to assure that leasing activities and drilling shall be carried out in such a manner as will result in a minimum of damage to wildlife resources.

(3) As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. As to coordination lands, representatives of the Bureau of Land Management and the United States Fish and Wildlife Service will, in cooperation with the authorized members of the

various State game commissions, confer for the purpose of determining by agreement those lands which shall not be subject to oil and gas leasing.

(4) The remaining lands in paragraph (a) (2) and (4) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management. The remaining lands in paragraph (a) (3) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the State Game Commission, the United States Fish and Wildlife Service, and the Bureau of Land Management.

(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b) (3) of this section shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil and gas leasing, together with a statement of the stipulations agreed upon by the parties thereto for inclusion in such leases to assure that all operations under the lease shall be carried out in such a manner as will result in a minimum of damage to wildlife resources. The agreements, as supplemented by maps or plats specifically delineating the lands, will be filed in the appropriate land offices of the Bureau of Land Management where they may be inspected by the public at the usual hours specified for that purpose. Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

(d) *Suspension of pending applications.* All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agree-

ments referred to in paragraph (b)(3) of this section shall have been completed.

(c) *Lands in requested withdrawal.* All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the consummation of the withdrawal, and thereafter such offers shall be considered in accordance with the provisions of this section.

d. The Order of the Secretary of the Interior published in the Federal Register of August 2, 1958 (23 F.R. 5883) provides in pertinent part:

Notice is hereby given that, pursuant to the regulation 43 CFR, 192.9 (Circular 1990), agreement as reflected by the map herein referred to, has been consummated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. The lands excluded from leasing are specifically delineated on the map of the Kenai National Moose Range, set forth below, which was approved on January 29, 1958, and are identified on said map as follows:

Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:

[Description omitted; essentially the southern half of the Range.]

The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of

1920, as amended (41 Stat. 437), and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.

All offers to lease must be submitted on Form 4-1158 and in accordance with the regulation 43 CFR 192.42, accompanied by a \$10 filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85-505 enacted July 3, 1958.

In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8.

All leases will be subject to the special stipulations (Form 4-1383) approved April 18, 1958 and published in the Federal Register April 22, 1958 (23 F.R. 2636, 2637).

FRED A. SEATON,
Secretary of the Interior.

July 24, 1958.

APPENDIX B

ORDERS INVOLVED SOLELY AS TO RESPONDENT COYLE

1. Public Land Order No. 487, June 16, 1948 (13 F.R. 3462):

By virtue of the authority vested in the President by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U.S.C. Title 43, secs. 141-143), and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the public lands within the following-described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:

[Description omitted; includes, *inter alia*, most of the lands in the Kenai National Moose Range that were excepted from Executive Order No. 8979, pp. 2a-3a, *supra*.]

2. Public Land Order No. 1212, September 9, 1955 (20 F.R. 6795):

By virtue of the authority vested in the President by Section 1 of the act of June 25, 1910 (36 Stat. 847; 43 U.S.C. 141), and otherwise, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

1. Public Land Order No. 487 of June 16, 1948, which temporarily withdrew the following-described land from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation, which was partially revoked by Public Land Orders No. 558, 653, 751, 778, 800, 812, 820, 839, 977, 1006, and 1020 is hereby revoked in its entirety: [description omitted; 160,974 acres.]

2. Subject to valid existing rights, the following-described lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes: [description omitted; 568 acres.]

3. The status of the following-described lands shall not be changed until it is so provided by [a future order] * * *: [description omitted; 1,676 acres.]

4. This order shall not otherwise become effective to change the status of the remaining lands until 10:00 a.m. on the 35th day after the date of this order. At that time the said lands shall become subject to settlement, application, petition and selection, as follows:

For a period of 91 days commencing at the date and on the hour hereinafter specified, the following-described public lands released from withdrawal by paragraph 1 of this order shall, subject to valid existing rights and the provisions of existing withdrawals, become subject * * * to application as indicated, and to the indicated form of appropriation only by qualified veterans of World War II, the Korean Conflict and by other qualified persons entitled to preference under the act of September 27, 1944 (58 Stat. 747; 43 U.S.C. 279-284) as amended, subject to the requirements of applicable law * * *:

(a) At 10:00 a.m. on the 35th day after the date of this order, to application under the

homestead laws only: [description omitted; 4,327 acres.]

(b) At 10:00 a.m. on the 63d day after the date of this order, to application under the homestead laws only: [description omitted; 4,543 acres.]

(c) At 10:00 a.m. on the 91st day after the date of this order, to settlement under the homestead laws or the Alaska Home Site Act of May 26, 1934 (48 Stat. 809; 48 U.S.C. 461) or the Small Tract Act of June 1, 1938 (52 Stat. 609, 43 U.S.C. 682a) as amended:

The unsurveyed public lands released from withdrawal by paragraph 1 of this order, and not otherwise rewithdrawn, or restored.

(d) At 10:00 a.m. on the 91st day after the date of this order, to application under the homestead laws or the Alaska Home Site Act of May 28, 1934 (48 Stat. 809; 48 U.S.C. 461) or the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a) as amended:

The surveyed public lands released from withdrawal by paragraph 1 of this order and not otherwise restored by paragraphs 4(a) or 4(b), or described in paragraph 3.

* * * * *

6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws, as follows:

(a) As to the lands described in paragraph 4(a), at 10:00 a.m. on the 126th day after the date of this order.

(b) As to the lands described in paragraph 4 (b), at 10:00 a.m. on the 154th day after the date of this order.

(c) As to the lands described in paragraph 4(d), at 10:00 a.m. on the 182nd day after the date of this order.

All applications filed either at or before 10:00 a.m. of such 126th, 154th, or 182nd day, including applications under the mineral-leasing laws, shall be treated as though simultaneously filed at the hour specified on such day. All applications, including applications under the mineral-leasing laws, filed under this paragraph after such 126th, 154th, or 182nd day, shall be considered in the order of filing. Mining locations made prior to such 126th, 154th, or 182nd day, as the case may be, shall be invalid.

7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4 (c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral-leasing laws in accordance with appropriate laws and regulations. All applications, including applications under the mineral-leasing laws, filed either at or before 10:00 a.m. of such 182nd day, shall be treated as though simultaneously filed at the hour specified on such 182nd day. All applications, including applications under the mineral-leasing laws, filed under this paragraph after such 182nd day shall be considered in the order of filing. Mining locations made prior to such 182nd day shall be invalid.

* * * * *

3. Amendment to Public Land Order No. 1212, October 14, 1955, 20 F.R. 7904:

Paragraphs No. 6 and 7 of Public Land Order No. 1212 of September 9, 1955, appearing as Doc. 55-7464 in 20 F.R. 6795 of the issue of September 15, 1955, are hereby amended by deleting therefrom the phrases "in-

cluding the mineral leasing laws", "including applications under the mineral leasing laws" and "including leasing under the mineral leasing laws," wherever they appear, and by adding after the words "mining locations" in the last sentence of paragraphs 6 and 7 of the order the words "for non-metalliferous minerals."

OCT 1 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, Secretary of the Interior,
Petitioner

v.

JAMES K. TALLMAN, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

CHARLES F. WHEATLEY, JR.
ROBERT L. McCARTY
McCARTY AND WHEATLEY
1201 Walker Building
Washington, D. C. 20005
Counsel for Respondents

INDEX

	Page
Questions Presented	1
Statement of the Case	2
Summary of the Argument	16
Argument.	
I. This Case Concerning Only the Validity of Ten Leases Within the Kenai National Moose Range	19
II. Executive Order No. 8979 and Public Land Order No. 487 By Their Terms Closed the Lands Involved to Oil and Gas Leasing	21
A. Executive Order No. 8979 By Its Plain Terms and By the Construction Given Those Terms Closed Those Portions of the Range to Which It Was Applicable to Oil and Gas Leasing	22
B. The Terms "Settlement, Location, Sale, or Entry in Both Executive Order No. 8979 and Public Land Order No. 487 Were Sufficient to Close the Lands to Leasing	28
C. A Contrary Administrative Construction of Similar Language Has Not Been Established	31
III. The Policy Which Prompted the Creation of the Range and the Secretary's Public Actions Subsequent to the Orders Are Consistent With the Range Being Closed	36
IV. Congress Neither Approves Nor Ratifies the Issuance of the Leases Which Conflict With Respondents' Applications	47
V. There Is No Indispensable Party Question in This Case	50

APPENDICES

Page

APPENDIX A—Executive Order No. 8979	1a
APPENDIX B—Public Land Order No. 487	4a
APPENDIX C—BLM Suspension Action, March 30, 1956	6a
APPENDIX D—Tables of Withdrawal Orders	7a
APPENDIX E—Approval of Swanson River Operating Program	11a
APPENDIX F—Map of Kenai National Moose Range.	

TABLE OF CITATIONS

CASES:

Barash v. Seaton, 256 F. 2d 714 (D.C. Cir. 1958)	51
Boesche v. Udall, 373 U.S. 472 (1963)	51
Bordieu v. Pacific Western Oil Co., 299 U.S. 65 (1935)	30
Bowles v. Semindle Rock & Sand Co., 325 U.S. 410 (1945)	35
Brooks v. Deware, 313 U.S. 354 (1941)	47
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)	51
Dow v. Ickes, 123 F. 2d 909 (D.C. Cir. 1941) <i>cert. denied</i> 315 U.S. 807 (1942)	25
Ex Parte Endo, 323 U.S. 283 (1944)	47
Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947)	47
Great Northern Ry. v. Sunburst Co., 287 U.S. 358 (1932)	21
Griffin v. Illinois, 351 U.S. 12 (1956)	21
Haby v. Stanolind Oil & Gas. Co., 225 F. 2d 723 (5th Cir. 1955)	50
Hynes v. Grimes Packing Co., 337 U.S. 121 (1949)	25
Kenny Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928)	25, 37
Mason v. United States, 260 U.S. 545 (1923)	26, 32
Master Crafters Clock & Radio Co. v. Vacherow & Constantin-Lee Coultre Watchers, Inc., 221 F. 2d 464 (2d Cir. 1955), <i>cert. denied</i> 350 U.S. 832	50
McKay v. Wahlenmaier, 226 F. 2d 35 (D.C. Cir. 1955)	35, 51
Pan American Petroleum Co. v. Pierson, 284 F. 2d 649 (10th Cir. 1960) <i>cert. denied</i> 366 U.S. 936 (1961)	25
Parker Rust-Proof Co. v. Western Union Telegram Co., 105 F. 2d 976 (2d Cir. 1939)	50

Index Continued

iii

	Page
Power Reactor Dev. Co. v. Electrical Union, 367 U.S. 396 (1961)	48
Safarik v. Udall, 304 F. 2d 944 (D.C. Cir.) <i>cert. denied</i> 371 U.S. 901 (1962)	21
Seaton v. The Texas Co., 256 F. 2d 718 (D.C. Cir. 1958)	51
State of Washington v. United States, 87 F. 2d 421 (9th Cir. 1936)	50
Thomas v. Union Pac. R., 139 F. Supp. 588 (D. Colo. 1956) <i>Aff'd</i> 239 F. 2d 641 (10th Cir. 1956)	50
United States v. Midwest Oil Co., 236 U.S. 459 (1915)	29
West v. Work, 11 F. 2d 828 (D.C. Cir.) <i>cert. denied</i> 271 U.S. 689 (1926)	25
Wilbur v. United States Ex. Rel. Barton, 46 F. 2d 217 (D.C. Cir. 1930) <i>Aff'd</i> 283 U.S. 414 (1931)	26, 29-30, 32
Work v. Louisiana, 269 U.S. 250 (1925)	51

DEPARTMENTAL DECISIONS:

Mary B. Brown, 62 I.D. 107 (1955)	33
Joyce A. Cabot, Allan B. Cabot, Walter G. Davis, 63 I.D. 122 (1956)	21
Devearl W. Dimond, 62 I.D. 260 (1955)	33
L. N. Hagood, 60 I.D. 462 (1951)	20
J. G. Hatheway, 68 I.D. 48 (1961)	20, 33
G. E. Kadane & Sons, 65 I.D. 446 (1958)	33
D. Miller, 60 I.D. 161 (1948)	34
Noel Teuscher, 62 I.D. 210 (1955)	34
Opinion of the Solicitor, 48 I.D. 459 (1921)	26, 31

STATUTES:

Act of June 6, 1924, 43 Stat. 464, as amended 48 U.S.C. § 221 (1948) (White Act)	25
Mineral Leasing Act, 41 Stat. 438 et seq. (1920) 30 U.S.C. § 181 et seq. (1958):	
Section 1, 30 U.S.C. § 181	24
Section 17, 30 U.S.C. § 226	24, 39
Section 29, 30 U.S.C. § 186	24
Section 42, 30 U.S.C. § 226-2	20
Pickett Act of 1910, 36 Stat. 847 (1910), 43 U.S.C. § 141 (1958)	28
Public Law 87-748, 76 Stat. 744 (1962) 28 U.S.C. §§ 1371, 1391(e) (Supp. 1962)	50

	Page
26 Stat. 1099 (1891), 48 U.S.C. § 355	27
26 Stat. 1101 (1891), 48 U.S.C. § 358	27
30 Stat. 409 (1898), as amended 48 U.S.C. § 371	27
30 Stat. 409 (1898), 48 U.S.C. § 411	27
30 Stat. 412 (1898), 48 U.S.C. § 417	27
30 Stat. 413 (1898), as amended 48 U.S.C. § 461	27
30 Stat. 414 (1898), 48 U.S.C. § 421	27
31 Stat. 326 (1900), as amended 48 U.S.C. § 381	27
31 Stat. 330 (1900), 48 U.S.C. § 356	27
34 Stat. 197 (1906), 48 U.S.C. § 357	27
38 Stat. 471 (1914), 48 U.S.C. § 432	27
38 Stat. 1214 (1915), 48 U.S.C. § 353	27
38 Stat. 1215 (1915), 48 U.S.C. § 354	27
42 Stat. 415 (1922), 48 U.S.C. § 376	27
45 Stat. 1091 (1929), 48 U.S.C. § 354a	27
49 Stat. 1250 (1936), 48 U.S.C. § 358a	27
52 Stat. 593 (1938), 48 U.S.C. § 353a	27
54 Stat. 1192 (1940), 48 U.S.C. § 363	27
62 Stat. 935 (1948), 28 U.S.C. § 139 (1958)	50
Fed. R. Cir. P. 12(h)	50

ORDERS AND REGULATIONS:

Executive Order No. 3596 (Dec. 22, 1921)	41
Executive Order No. 5214 (Oct. 30, 1929)	34
Executive Order No. 7023 (April 22, 1935)	41
Executive Order No. 7522, 1 F.R. 2184 (1936)	4
Executive Order No. 7593 (March 3, 1937)	41
Executive Order No. 8038, 4 F.R. 391 (1939)	4
Executive Order No. 8039, 4 F.R. 391 (1939)	4
Executive Order No. 8116, 4 F.R. 1997 (1939)	36
Executive Order No. 8167, 4 F.R. 2410 (1939)	36
Executive Order No. 8979, 6 F.R. 6471 (1941) ... 3, 7, 21, 22-27, 34, 39, 43, 46, 48	
Executive Order No. 10355, 17 F.R. 4831 (1952)	19
Public Land Order No. 144, 8 F.R. 9430 (1943)	9, 41
Public Land Order No. 243, 9 F.R. 11400 (1944) ...	4, 9
Public Land Order No. 487, 13 F.R. 3462 (1948) ...	5, 21, 28-30, 34, 36, 37, 38, 39, 41
Public Land Order No. 1212, 20 F.R. 6795 (1955) .	7-8, 38, 39, 43
10 F.R. 11257 (1945)	33
Suspension Order of Aug. 31, 1953	6
Order of Aug. 2, 1958, 23 F.R. 5883	14-15, 45

Index Continued

REGULATIONS:

Page

43 C.F.R. § 51.1 (1939)	20-21, 28
43 C.F.R. § 65.1 (1954)	27
43 C.F.R. § 66.1 (1954)	27
43 C.F.R. § 67.5 (1954)	27
43 C.F.R. § 70.5 (1954)	27
43 C.F.R. § 71.1 (1939)	24
43 C.F.R. § 76.6 (1954)	27
43 C.F.R. § 79.2 (1954)	27
43 C.F.R. § 79.16 (1954)	27
43 C.F.R. § 81.1 (1954)	27
43 C.F.R. § 192.9 (Cir. 1945), 20 F. R. 9009 (1955)	8-10, 41-44
43 C.F.R. § 192.9 (1962 Supp.)	12, 44-45
43 C.F.R. § 192.44 (1963)	39
43 C.F.R. § 221.3 (1963)	20
43 C.F.R. § 221.33 (1963)	20
43 C.F.R. § 295.8 (1963)	15, 39, 46

MISCELLANEOUS:

Complete Works of Lewis Carroll (Modern Library Ed.)	36
45 Cong. Rec. 621-22 (1910)	29
102 Cong. Rec. 260 (1956)	41
102 Cong. Rec. 5588 (1956)	49
102 Cong. Rec. 5798 (1956)	44
71 Harv. L. Rev. 877 (1958)	50
Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, 84th Cong. 2d Sess. (1956)	48
Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 2101 84th Cong. 2d Sess. (1956)	48
H. Rep. No. 1941, 84th Cong. 2d Sess. (1956) ..	37, 43, 44, 48
3 Moore's Federal Practice (2d Ed. 1963)	50

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, Secretary of the Interior,
Petitioner

v.

JAMES K. TALLMAN, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

This controversy involves only the determination of the respective rights of conflicting applicants to ten oil and gas leases on approximately 25,000 acres of the Kenai National Moose Range in Alaska. It is con-

ceded that if two withdrawal orders closed the lands to leasing, the court of appeals must be affirmed. Thus the two questions presented are:

1. Whether Executive Order No. 8979 which in creating the Kenai National Moose Range withdrew certain lands therein from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska" closed those lands to oil and gas leasing.

2. Whether Public Land Law No. 487, which withdrew other lands in the Kenai National Moose Range [left available by Executive Order No. 8979 to use and disposition under the public land laws] from "settlement, location, sale or entry", closed those lands to oil and gas leasing.

STATEMENT OF THE CASE

Contrary to the broad "consequence" seen by the petitioner, the District of Columbia Circuit made no ruling that all the leases within the Kenai National Moose Range are subject to cancellation. All that the court below decided was that the ten respondents were entitled to individual leases aggregating about 25,000 acres over conflicting applications on the same acreage filed by representatives of certain major oil companies. In reaching this result the court of appeals had before it all of the specific orders and actions thereunder by the Department dating back to 1941 relating to the Kenai National Moose Range, as well as the Departmental regulations pertaining to wildlife refuges in general. Since this detailed history is not discussed in Petitioner's statement of the case despite indication at the outset of the opinion below that

this chronology was relevant to the decision (R. 83), the major events in sequence are outlined below:

The order of December 16, 1941. President Roosevelt by Executive Order No. 8979 of December 16, 1941 (6 F.R. 6471; App. A hereto) established the Kenai National Moose Range. The special purpose of the withdrawal to protect the unique species of giant Kenai moose was expressly stated in the order as follows:

* * * for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose * * *

As to the lands within the refuge involving all respondents except Coyle, the Executive Order specifically provided:

• None of the above-described lands excepting Tps. 5N., Rs. 8, 9, 10, and 11W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kaslof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the

act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: * * *

The Executive Order in 1941 was in conformity with the established practice of the President in withdrawing land for wildlife purposes from disposition under the public land laws to expressly provide in the order if the lands were to remain open to leasing under the Mineral Leasing Act.¹ No such express proviso was included in the Kenai Order.

¹ For example, Executive Order No. 7522 by President Roosevelt on December 21, 1936 (1 F.R. 2184), creating the Charles Sheldon Antelope Range expressly provided:

* * * the lands . . . are hereby withdrawn from settlement, location, sale, or entry and reserved and set apart . . . *Provided*, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, *leasing*, or patenting the mineral resources of the lands under the applicable laws * * *. (Emphasis added)

See Executive Orders 8038 and 8039 by President Roosevelt of 1939 (4 F.R. 391) creating the Cabeza Pireta Game Range and Kofa Game Range respectively for identical language. And in 1943, a Public Land Order by Acting Secretary of the Interior Abe Fortas establishing the Columbia National Wildlife Refuge expressly provided:

* * * the following described public lands . . . are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining laws, *but not the mineral leasing laws*, * * * (P.L.O. 243; 9 F.R. 11400). (Emphasis added)

For further discussion and other orders see *infra*, p. 34; Appendix D hereto.

The Executive Order creating the Kenai moose refuge, however, did not withdraw the entire area from disposition under the applicable public land laws but excepted a certain area (in which the lands selected by Respondent Coyle are located) as follows:

** * * Provided, however, That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska * * * (Emphasis added.)*

The Director of the Fish and Wildlife Service commenting on the purpose of the Range prior to its establishment by the President made clear the intent of the order that only the excepted portion would be available for "use and disposition" under the Alaska public land laws:

** * * The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale or other disposition under any of the public lands laws applicable to Alaska * * * (R. 69; emphasis added.)*

The order of June 16, 1948. Public Land Order No. 487 of June 16 1948 (13 F.R. 3462; App B hereto) pertained only to the excepted area of the moose

refuge above described. It withdrew some, but not all of the excepted area as follows:

* * * the public lands within the following described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:

* * * * *

This order shall take precedence over, but shall not modify . . . the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941 * * *

The general suspension order of August 31, 1953. In 1953 the Department of the Interior undertook a general study of those wildlife refuges, or portions of wildlife refuges, which were "otherwise available for leasing" to determine whether such leasing was consistent with the protection of wildlife therein. Pending completion of the study, the Department on August 31, 1953 issued a general order suspending "action on all pending oil and gas lease offers and applications for lands within such refuges." (See R. 41)

As of the date of this order, the Range lands were thus in three categories: (1) a large portion withdrawn from any disposition under the public land laws applicable to Alaska by the terms of the 1941 Executive Order; (2) part of the excepted area of the Range, originally left available to disposition and use under the public land laws but withdrawn by the 1948 public land order; and (3) that portion of the excepted area not withdrawn by the 1948 public land order, but suspended by the 1953 order from any action on "pending oil and gas lease offers." This was the status of the

lands when the oil company representatives (to whom the Anchorage Land Office subsequently granted leases in the present case conflicting with Respondents' applications) filed their oil and gas lease offers between October 16, 1954, and January 28, 1955. Nine of the conflicting offers were in category (1), and one, contrary to the Coyle offer, was in category (2).²

The order of September 9, 1955 and its amendment. Public Land Order No. 1212 issued September 9, 1955 (20 F.R. 6795), revoked in its entirety Public Land Order No. 487 of June 16, 1948. As noted by the court of appeals, (R. 84), the order provided initially that a small piece of land (not involved in the present suit) was:

2. Subject to valid existing rights . . . withdrawn from all forms of appropriation under the public-land laws, including the mining, *but not the mineral-leasing laws*, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. . . . (Emphasis added.)

² The petitioner's de hors the record assertion that in 1953, a lease issued within the area covered by Executive Order 8979 (Pet. Br. p. 12) without describing where, is meaningless. Respondents' investigation reveals that apparently this lease, as well as others prior to 1955, was intended to be issued for lands completely outside the Moose Range on lands never closed to oil and gas leasing.

Respondents deplore the repeated resort to unfounded evidence not in the record, which respondents have had no opportunity to challenge in a judicial proceeding. The petitioner should be estopped from now so relying by its representations to the District Court below in support of its motion for summary judgment that no genuine issue of fact existed and that the case was appropriate for decision based on the administrative record and statements under Rule 9 (h) (R. 76-79).

The order then proceeded to deal with the remainder of the land restored. After granting preference for home-steading, for certain periods of time under section 4, sections 6 and 7 provided as follows:

6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, *including the mineral-leasing laws.* * * *

7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, *including leasing under the mineral-leasing laws.* * * * (Emphasis added.)

On October 14, 1955, Public Land Order No. 1212 was amended to delete the provisions for leasing under the mineral leasing laws appearing in paragraphs 6 and 7 of the order but not in paragraph 2. (20 F.R. 7904.)

The amended regulations of December 8, 1955. On this date the Department amended its general regulations pertaining to wildlife areas (43 C.F.R. 192.9 (Circular 1945); 20 F.R. 9009; Pet. App. 3a.).

These regulations did not state, as did the subsequent regulations of January 8, 1958, *infra*, pp. 12, 44-45, that they were to apply to all refuges or portions of refuges, even to those which by the terms of their withdrawal order were closed to oil and gas leasing. The regulation contained two appendixes: Appendix A

listed lands thereafter closed to leasing;³ Appendix B listed lands thereafter to be available to oil, and gas leasing, but only upon the prior approval, within six months, of an operating program for the area by the Director, Fish and Wildlife Service, to insure protection of the wildlife:

* * * Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

Appendix B expressly listed certain areas within the closed portion of the Kenai Moose Range as follows:⁴

³ No lands within the Kenai Range were listed in Appendix A. A review of the orders creating each of the refuges listed shows that none contained language similar to that of the Kenai Order closing them to oil and gas leasing.

⁴ Appendix B also listed other wildlife refuges which were closed by the terms of the orders creating them (i.e. The Salt Plains Refuge in Oklahoma, 8 F.R. 9430), as well as others that were expressly open (i.e. Columbia Nat'l Wildlife Refuge, 9 F.R. 11400).

Appendix B—Fish and Wildlife Service Lands available for leasing under a Satisfactory Development and Operating Plan.

Kenai: The following areas and all lands within one mile of Tustumena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

The Petitioner relies on extra-record evidence regarding the issuance of leases within the Kenai range prior to 1958, which involve for the most part the leases in an area known as the Swanson River Unit (Brief pp. 12-13). However, the facts are that within the six-month period specified in Appendix B an operating program was submitted and in 1956 the Department authorized the issuance of a group of 31 leases comprising the 71,680 acres of the Swanson River Unit under the procedures expressly provided for Appendix B lands (Resp. App. E hereto).⁵ Thus the Department in fact treated the Swanson River Unit as governed by Appendix B procedures, even though it was apparently not located within the area specified in that Appendix.⁶ Other than this unit it does not appear

⁵ Although the Solicitor General designated the entire record for printing, this and other items in the Supplemental Transcript from the Court of Appeals were not printed, apparently by mistake. Respondents' Appendix A was contained in that transcript at page 182.

⁶ The Government in its reply brief to the petition for a writ of certiorari stated that the leases comprising the Swanson River unit were not within the lands listed in this Appendix and specified the exact distances each listed mark from the Swanson River Unit. (Reply brief p. 3). The Geological Survey's map of the Kenai area does not show each landmark, but those shown affirm the Government's statement.

that any other operating programs were submitted for lands in the withdrawn area.

Reimposition of general suspension of leasing in 1956. The Director of the Bureau of Land Management in a general order in 1956 affecting all wildlife refuges or portions of such refuges "remaining open to leasing" (R. 41-42), again suspended all "disposition by lease or otherwise or the granting of any use of such lands."

Leases issued prior to 1958. The petitioner at page 12 of his brief alleges that a number of leases were issued within the Moose Range for various years prior to 1958 based on an alleged ex parte off the record investigation of Anchorage land records (see Pet. Br., pp. 12-13; see note 2, p. 7, *supra*). However, petitioner neglects to advise the Court as to the particular status of the lands upon which those leases were issued. A map submitted by the oil companies with their unsuccessful motion for leave to file as amici curiae in the court of appeals shows that all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order, or were in the Swanson River Unit which, as seen above (pp. 10-11), was treated as authorized by Appendix B procedures by the regulations of December 8, 1955 (Tr. 146; map reproduced as Resp. App. F hereto).⁷ Based on this map, other than

⁷ The map shows a number of leasing blocks in the open area which are cut short at the boundary between the open and withdrawn areas of the Moose Range, thus showing that the Department must have in fact treated the withdrawn area as closed. The map shows further that there were offers filed prior to 1958 in the open excepted area of the Range which were not acted upon until after the 1958 order, presumably because suspended by the general suspension orders above noted.

in these two special areas of the Moose Range no oil and gas leases were issued for the withdrawn lands within the Range, including the lands in dispute here, from the time the Range was created in 1941 until the Land Office action in 1958 here contested.

The general regulations of January 19, 1958 and the Kenai Range order of August 2, 1958. The specific order by which the Range lands involved in this case first clearly became available for leasing was Secretary of Interior Seaton's order of August 2, 1958.⁸ This order followed a complete revision of the general regulations, issued January 10, 1958, expressly pertaining to all wildlife lands.

The new January 1958 general regulations (23 F.R. 227, 43 C.F.R. § 192.9 (1963); Pet. App. 5a) followed a comprehensive examination of all wildlife lands owned by the United States, regardless of whether they had been previously closed or open to oil and gas leases. It provided that "no offers for oil and gas leases will be accepted" and "no leases . . . will be issued" on any lands defined as "wildlife refuge lands,"

* * * even though such lands . . . by the terms of *the withdrawal order, may be subject to mineral leasing* (43 C.F.R. § 192.9(a)(1); 192.9(b)(1); emphasis added)

⁸ The Secretary conceded below that with respect to this area, no leasing was possible prior to the order of August 2, 1958, but argued that this resulted from the suspension orders and did not preclude the filing of lease offers prior to the effective date of the January 10, 1958 regulations (R. 41, 45). It is curious, however, that the Department issued leases in the excepted portion of the Range prior to 1958 by making individual waivers of the suspension orders, but never followed a similar procedure with respect to the withdrawn area of the Range. The Secretary further conceded that the Moose Range was closed to oil and gas lease offers between January 10, 1958 and August 14, 1958 (R. 43).

This did not affect the Kenai Moose Range, even though the Range was within the definition of "wildlife refuge land,"⁹ due to another provision of the regulation expressly authorizing future leasing of lands in Alaska wildlife refuges.¹⁰ All Alaska wildlife areas are treated the same under the new regulation whether previously open or closed to oil and gas leasing with such lands to be available for leasing if, and only if, specific agreements could be worked out between the Bureau of Land Management and the Fish and Wildlife Service to protect the wildlife.

Within a few weeks after promulgation of these regulations, the Secretary classified lands in the Kenai National Moose Range for oil and gas leasing, stating in a press release issued January 29, 1958:

I have approved this week classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development. * * *

* * * * *

I am assured by Assistant Secretary Leffler that this action *opening a portion of the Kenai range* subject to the proposed regulated development is entirely consistent with the primary purpose for which the range is managed. (R. 15; emphasis added.)

⁹ The Departmental Wildlife regulations in effect prior to this time expressly listed the Kenai Moose Range as a "wildlife refuge." 50 C.F.R. § 25.1 (1963)

¹⁰ Thus the 1958 regulations prohibited any leasing or lease offers in all wildlife refuge lands in the continental United States, but by definition permitted such leasing in Alaska refuges only if in the future the Bureau of Land Management and Fish and Wildlife Service should so decide, with approval of the Secretary.

This was followed by Secretary Seaton's order of August 2, 1958 (23 F.R. 5883; Pet. App. 9a), which after referring to a consummated agreement necessary to protect wildlife, provided:

Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, *are not opened to oil and gas leasing*: . . . (Emphasis added.)

The lands described as *not opened* involved for the most part lands in the southern part of the Range and did not embrace any of the lands involved in this case, which are in the northern part of the Range. The northern lands *opened* by this 1958 order, embraced both the area originally withdrawn by the 1941 order as well as the excepted area, which the 1941 order left open but on which leasing had been suspended at various times prior to 1958. As to these now opened lands, the August 2, 1958, order provided:

* * * Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulation.

* * * * *

In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with

the procedure outlined in the regulation 43 CFR 295.8.¹¹

Departmental action in this case. On August 14, 1958 respondents duly filed their respective offers to lease in accordance with the procedure specified in the Secretary's order of August 2, 1958. About a year later, on September 4, 1959, the Land Office held a public drawing pursuant to the provisions of 43 C.F.R. 295.8 (see R. 18-26) to determine priorities, as required by the August 2, 1958 order. At the drawing, respondents' lease offers were the first drawn for the lands involved in this case.

Sometime in the fall of 1958, after respondents had filed but without any notice to them, the Anchorage Land Office issued leases for the lands in question to the representatives of the major oil companies, based on the offers filed by them between October 15, 1954

¹¹ 43 C.F.R. 295.8:

Processing of simultaneous applications. All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. . . .

(b) All such applications *which conflict in whole or in part will be included in a drawing* which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations. (Emphasis added.)

and January 28, 1955. Assigning this leasing action as its reason, and despite respondents' success in the drawing, the Anchorage Land Office in a decision dated October 7, 1959, notified respondents for the first time that their lease offers were rejected.

Respondents appealed the decision of the Anchorage Land Office to the Director of the Bureau of Land Management and from there to the Secretary of the Interior, where the deputy solicitor of the Department decided that the prior action of the Land Office should stand. After a petition for rehearing was denied by the same deputy solicitor, the action below was filed in the District Court. On appeal from a judgment for Petitioner, the court of appeals in a unanimous decision by Judges Bastian, Miller and McGowan, reversed and granted judgment for respondents (R. 82-95).

SUMMARY OF THE ARGUMENT

I

The Government depicts a significance for this case which it simply does not have. The case does not concern all the leases issued within the Kenai Range; it involves only ten. And an affirmance of the decision below need not have an adverse effect on any leases other than the ones involved here. No one can challenge those leases, and in the absence of a challenge the Secretary need not cancel them. However, if the Court thinks otherwise it should give its decision prospective effect only.

II

Executive Order No. 8979 by its terms closed the lands upon which nine of the ten Respondents filed applications to mineral leasing. This order closed

certain lands to "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska . . ." but excepted a portion of the range from this withdrawal specifying that their use as a part of the range "shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska." When the reciprocal provisions are read together it becomes clear that the order intended to close the lands to all forms of use and disposition except as otherwise expressly provided. This intent is further manifested in the use of the term "disposition," which was used by Congress in the Mineral Leasing Act and applied by the courts in connection with mineral leasing. The parenthetical exception for fish trap sites is further evidence that the term must be given an expansive meaning, for such sites are licensed, not deeded.

Both the Executive Order and Public Land Order No. 487 use the language "settlement, location, sale, or entry" and this language without more effects a withdrawal from oil and gas leasing. The Pickett Act of 1910 used the same language, and it is settled law that that act authorizes withdrawals from oil and gas leasing. Thus the phrase is a phrase of art and its appearances in the orders must be construed to close the lands to leasing.

There is no convincing evidence of consistent administrative construction to the contrary. In fact the evidence shows that during this period the Department considered the language such as these two orders contain to effect a withdrawal from leasing, and specifically excepted the Mineral Leasing Act when that was the design.

III

The express purpose for the creation of the Kenai Range by the President was the protection of the giant Kenai moose, a unique wildlife feature, which purpose is clearly inconsistent with any uncontrolled oil and gas leasing activity of the area. Until 1958 when the Secretary, pursuant to new and completely revised wildlife regulations, approved by express order a detailed operating plan worked out by the Fish and Wildlife Service and Bureau of Land Management for the protection of the moose covering the specific lands involved in this case, there were no procedures available for leasing these closed portions of the Kenai Range. All of the Secretary's public orders dealing with the Range since its creation prior to 1958 are consistent with the Range being closed, and Respondents, as well as other members of the public, were entitled to so rely.

IV

The "Congressional ratification" urged by the Government simply does not exist. The great bulk of the material upon which this argument depends did not result in legislation, and the only positive thing it shows is that the leasing program on wildlife refuges was confused. The Alaskan Submerged Lands Act did not ratify anything. It merely provided relief for those who had a valid right to a lease. Furthermore the material presented to Congress in connection with this Act does not reveal whether any of the applications or leases discussed were invalid under our view of the case.

V

The Government does not urge that the holders of the outstanding leases which must be cancelled if Re-

spondents prevail are indispensable parties to this action. The point was not raised below and is properly waived by the Government.

Furthermore it is settled that these lease holders are not indispensable parties. The Court of Appeals for the District of Columbia Circuit laid that question to rest in *Barash v. Seaton*, a case which Respondents contend was properly decided.

ARGUMENT

I. THIS CASE CONCERNS ONLY THE VALIDITY OF TEN LEASES WITHIN THE KENAI NATIONAL MOOSE RANGE.

The Government's attempt to extend the significance of this case beyond its facts necessitates that at the outset we make clear precisely what is and what is not involved here. This litigation does not involve "the security of the title of hundreds of persons" nor investments "of the magnitude of tens of millions of dollars" as the Government would have the Court believe. Rather, the case involves only ten leases covering a total of 25,000 acres¹² upon which, to Respondents' knowledge, there has been absolutely no drilling or production of gas and oil.¹³ That was all that was before the court of appeals and all that is before this Court. Nothing in the opinion below requires the sweeping consequences predicted by the Government

¹² The decision below was based upon a construction of specific Executive and Public Land Orders. Similar wording in other orders does not pose a problem with regard to any future oil and gas leasing in other areas because the Secretary possesses full power to change or revise the terms of any withdrawals of public land. Exec. Order No. 10355, 17 Fed. Reg. 4831 (1952).

¹³ Some of the 25,000 acres have been included with other lands on which wells have been drilled under unit agreements.

nor need an affirmance by this Court have such effect. There are several reasons for this.

In the first place, the decision below was nothing more than a determination of which conflicting applicants for noncompetitive leases were entitled to leases under Section 17 of the Act. There is nothing in the record to show that there were any other conflicting lease offers for lands within that portion of the Range which the court of appeals held was closed. In the absence of another qualified applicant the Act does not require cancellation of an otherwise acceptable offer which was accepted and suspended when it should have been rejected.¹⁴

Second, even if there were conflicting offers, the period in which the unsuccessful offerors could assert their rights has long since passed.¹⁵ To Respondents' knowledge, they are the only ones who have preserved

¹⁴ See *L.N. Hagood*, 60 I.D. 462 (1951). The rule that applications for leases on lands which are not available for leasing will be rejected is an expression of administrative policy rather than a statutory command. *J.G. Hatheway*, 68 I.D. 48, 52 (1961). The Secretary's discretion over the administration of the public land laws is broad enough to enable him to make an exception to this policy in cases where the lease was issued to the only qualified applicant and the lessee has made substantial expenditures in reliance thereon.

¹⁵ § 42 of the Mineral Leasing Act expressly provides:

"No action contesting a decision of the Secretary involving an oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter." 30 U.S.C. § 226-2.

The Department's Rules of Practice provides that appeals within the Department must be made within 30 days of the adverse decision, 43 CFR §§ 221.3, 221.33 (1963).

their rights. And only they have standing to challenge the validity of existing leases within the Range.¹⁶

Third in the absence of a challenge to the validity of existing leases, the Secretary need not sua sponte cancel any other outstanding leases within the Range on the basis of the decision in this case. See *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir.), cert. denied 371 U.S. 901 (1962). Finally, this Court clearly has the power to make its decision operate prospectively only, thus removing for all time any doubt as to the validity of any other existing leases.¹⁷

II. EXECUTIVE ORDER NO. 8979 AND PUBLIC LAND ORDER NO. 487 BY THEIR TERMS CLOSED THE LANDS INVOLVED TO OIL AND GAS LEASING.

The Court of Appeals held that Executive Order No. 8979 which created the Kenai National Moose Range withdrew from oil and gas leasing the lands upon which nine of the ten Respondents filed applications and that the lands filed upon by Respondent Coyle (which were included in lands specifically excepted under E.O. 8979) were subsequently withdrawn by Public Land Order No. 487. It is undisputed that if these orders did close the lands involved to leasing, the

¹⁶ It is clear that under Departmental decision once a lease issues, even though it is void, the lands embraced therein are not available for leasing and applications to lease them must be rejected. e.g. *Joyce A. Cabot, Allan B. Cabot, Walter G. Davis*, 63 I.D. 122 (1956). Thus there is no way whereby future applicants can obtain standing to urge that all leases within the withdrawn area are nullities.

¹⁷ *Great Northern Ry. v. Sunburst Co.*, 287 U.S. 358, 364 (1932); *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Separate opinion of Frankfurter, J.); *Safarik v. Udall*, 304 F. 2d 944, 949, 50 (D.C. Cir., cert. denied 371 U.S. 901 (1962)): Prospective application appears appropriate where a lease has issued, the time for challenge passed and investment made in reliance upon its validity.

Respondents are the first qualified applicants for the leases and the judgment below must be affirmed.¹⁸ It is the contention of the Respondents that the clear language of these orders compels the conclusion that they had that effect. The orders will be discussed in turn.

A. Executive Order No. 8979 by Its Plain Terms and by the Construction Given Those Terms Closed Those Portions of the Range to Which It Was Applicable to Oil and Gas Leasing

Executive Order No. 8979 provided in pertinent part:

None of the above-described lands excepting [a specified area which included the lands of the Coyle application] shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming and for other purposes", 44 Stat. 821, U.S.C. title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C. title 48, secs. 471-471o: * * *

The court of appeals correctly held that this language "clearly did remove the land involved from oil and gas leasing." The language of withdrawal is extremely broad, and when read with other parts of the order, it is obvious that the Order was intended to have an expansive meaning. Thus, immediately following

¹⁸ The Secretary conceded in the court of appeals that if any of the orders closed the range, the only possible defense would be the statute of limitations, a point not raised in this Court.

the language above quoted the Order deals with the lands excepted from its effect in the following manner:

* * * *Provided, however*, that as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the National Moose Range shall be without interference with the *use and disposition thereof* pursuant to the public-land laws applicable to Alaska * * * (Emphasis added.)

The phrase "use and disposition" contained here refers to that which is forbidden by the withdrawal clause, and the presence of the word "use" in this part of the order clearly indicates that the withdrawal was not limited to those activities which terminate in the passage of a fee, as the Government argues, but includes any use pursuant to the public land laws, not otherwise excepted.

Furthermore, the language of withdrawal was not limited to the words "settlement, location, sale or entry" (although those alone would have been sufficient to close the lands to leasing, see discussion *infra*) but contained the inclusive phrase "or *other disposition* under *any* of the public land laws applicable to Alaska." (Emphasis added) The Mineral Leasing Act is clearly a public land law applicable to Alaska, and was so considered in 1941. The Secretary's own regulations expressly recognize this fact.¹⁹ It is also

¹⁹ The Secretary's regulations in effect at the time of the Order read in pertinent part:

Part 51—PUBLIC LAND LAWS APPLICABLE TO
ALASKA

Section 51.1 GOVERNING LAWS:

• • • • •

... in Section 3 of the Act of August 24, 1912 ... It was provided that "the Constitution of the United States, and all

virtually incontestable that the term "disposition" in the Order must be read to include leasing. Section 1 of the Mineral Leasing Act expressly states that

"Deposits of . . . oil, oil shale, or gas, and lands containing such deposits [with certain inclusions and exceptions] shall be subject to disposition in the form and manner provided by this Act . . . 41 Stat. 438 (1920) 30 U.S.C. § 181 (Emphasis added.)"

And Section 17 which deals specifically with the issuance of oil and gas leases begins with the sentence *"All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior"* 60 Stat. 951 (1946), as amended 30 U.S.C. § 226 (1958).²⁰ (Emphasis added) The fact that a lease is a form of

the laws thereof which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States."

In an opinion dated June 29, 1915 (30 Op. Atty. Gen. 387), the Attorney General had occasion to consider the effect of the Act of August 24, 1912, in respect to extending certain public-land statutes to Alaska, and in this connection, he stated: "The express exception of the Public Land Laws, found in the earlier organic acts, is here omitted; all the laws of the United States are to operate in Alaska save only such as may be locally inapplicable". 43 CFR § 51.1 (1939). (This regulation has remained substantially unchanged. See 43 CFR § 51.1 (1964).)

• • • • •

71.1 STATUTORY AUTHORITY. The disposition of oil and gas deposits in lands owned by the United States in Alaska is governed by the Act of February 25, 1920 . . . known as the Mineral Leasing Act. 43 CFR § 71.1 (1939) (Substantially the same section existed in the 1964 edition).

²⁰ See also § 29, 41 Stat. 449, 30 U.S.C. § 186 (1958) which gives the Secretary authority to reserve "the right to lease, sell or otherwise dispose of" the surface of certain lands (Emphasis added).

disposition has also received judicial recognition. In *West v. Work*, 11 F. 2d 828, 831 (D.C. Cir.) *cert. denied* 271 U.S. 689 (1926), the court said that the Mineral Leasing Act:

* * * was * * * the expression of a new policy for the *disposition of public lands open to exploration or entry*, by lease, instead of by complete alienation. (Emphasis added)

and this language was quoted with approval in the recent case of *Pan American Petroleum Corp. v. Pierson*, 284 F. 2d 649, 654 (10th Cir. 1960), *cert. denied* 366 U.S. 936 (1961).²¹ Thus, both Congress and the courts have used the term "disposition" in relation to oil and gas leasing, and from this it must follow that the President was so using it in Executive Order No. 8779.

The correctness of the construction given the Order by the court of appeals is confirmed by the parenthetical exception of fish trap sites, which, as that court recognized, would be unnecessary if the Order were designed to cover only total alienation of the interest of the United States. Fish trap sites are licensed by the Secretary, not deeded.²² Some reason must be given for this exception, and the only reason-

²¹ See also *Kenney Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 491 (1928).

²² Act of June 6, 1924, 43 Stat. 464, as amended 48 U.S.C. § 221 (1958); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 121 (1949). The court of appeals was of the opinion that those licenses are similar in many respects to a lease (R. 88). The fact that such licenses are regulatory does not detract from the correctness of this observation. In practical effect, the issuance of a fish trap license granted an exclusive right to set traps in a specific area. See *Dow v. Ickes*, 123 F. 2d 909 (D.C. Cir. 1941), *cert. denied* 315 U.S. 807 (1942).

able explanation of its presence is that without it the order would prevent the issuance of fish trap licenses. If this be so, *a fortiori* oil and gas leasing is also embraced within the language of the Order.

The two other specific Alaska statutes included in the withdrawal are by no means inconsistent with the construction given the Order by the court of appeals. As the court noted these are not public land laws of general applicability throughout the country. Furthermore, they are the only land laws applicable only to Alaska which required specific treatment.²³ Thus, the Order withdraws the lands from use under any

²³ The Order creating the range reserved the lands for the use of the United States and withdrew them from the effect of the public land laws of general applicability. The remaining laws applicable only to public lands in Alaska either extend certain of the general laws to Alaska, concern specific lands, or by their terms or the regulation under them are limited to unreserved lands. See 38 Stat. 1214 (1915), 48 U.S.C. § 353 [reservation of lands for educational purposes; existing reservations excepted]; 52 Stat. 593 (1938), 48 U.S.C. § 353a [Gives Secretary discretion to withdraw and reserve small tracts for Indian schools and hospitals, etc. (makes no disposition)]; 38 Stat. 1215 (1915), 48 U.S.C. § 354 [Grants specific lands to Alaska for agricultural school and school of mines]; 45 Stat. 1091 (1929), 48 U.S.C. § 354a [Gives Alaska right to select unreserved lands; See 43 CFR § 76.6 (1954)]; 26 Stat. 1099 (1891), 48 U.S.C. § 355 [Makes general town-site entry law applicable to Alaska]; 31 Stat. 330 (1900), 48 U.S.C. § 356 [Concerns lands occupied by missionaries in 1900]; 34 Stat. 197 (1910), 48 U.S.C. § 357 [Homestead allotments to Indians. Statute gives Secretary discretion to make allotment. Regulations make it clear this concerns only unreserved lands. See 43 CFR § 67.5 (1954)]; 26 Stat. 1101 (1891), 48 U.S.C. § 358 [A specific reservation established]; 49 Stat. 1250 (1936), 48 U.S.C. § 358a [Concerns land reserved for Indians]; 54 Stat. 1192 (1940), 48 U.S.C. § 363 [Gives Secretary power to lease or sell unreserved land to cities and towns]; 30 Stat. 409 (1898), as amended 48 U.S.C. § 371 [Extends homestead laws to Alaska. Regulation also specifically excludes reserved or withdrawn lands. See 43 CFR § 65.1 (1954)];

conceivable law and recognizes what was implicit in the Secretary's regulations,²⁴ i.e., that the phrase "public land laws applicable to Alaska" refers to laws of general applicability.

In its language Executive Order No. 8979 is unique, which makes the Departmental Memorandum and the commentator cited by the Government in an attempt to limit the scope of the language totally inapplicable. In point of fact in only one instance has the Department considered language in any way similar to this,²⁵ and Mr. Hoffman whom the Government cites and who apparently relied on this Memorandum, is careful to

42 Stat. 415 (1922); 48 U.S.C. § 376 [Entry on coal, oil, or gas lands which are unreserved. See 43 CFR § 66.1 (1954)]; 31 Stat. 326 (1900), as amended 48 U.S.C. § 381. [Extends general mining laws to Alaska]; 30 Stat. 409 et seq. (1898), 48 U.S.C. § 411 et seq. [Railroad rights of way; made specifically inapplicable to reserved lands by § 7 of Act, 30 Stat. 412, 48 U.S.C. § 417]; 30 Stat. 414 (1898), 48 U.S.C. § 421 [Provided for sale of timber under Secretary's regulations. Regulations specifically exclude reserved lands. 43 CFR § 79.2, 16 (1954); 38 Stat. 741 et seq. (1914); 48 U.S.C. § 432 et seq. [Leasing of coal lands. Regulation specifically deals with withdrawn lands. Agency having control of area has a veto. 43 CFR § 70.5 (1954). Furthermore, Kenai is not classified as coal land] 30 Stat. 413 (1898) as amended 48 U.S.C. § 461 [Trade or manufacturing sites. It is clear that lands must be unreserved. 43 CFR § 81.1 (1954)].

²⁴ 43 C.F.R. Part 51 (1939). Set out *supra* at note 19.

²⁵ Memorandum of the Solicitor, 48 I.D. 459 (1921) considered a statute which withdrew lands from "entry, location, or other disposal." Respondents have found no other Departmental action which has dealt with such language, and the validity of this opinion is questionable in view of the opinion of this Court in *Mason v. United States*, 260 U.S. 545, 553-55 (1923) and of the court of appeals in *Wilbur v. United States ex rel Barton*, 46 F. 2d 217 (D.C. Cir. 1930) *aff'd* 283 U.S. 414 (1931). Furthermore it was not considered good authority by the Department itself at the time this Order was issued. See discussion *infra* pp. 31-36.

restrict his opinion to the "ordinary" case. The fish trap exception, the specific reference to particular Alaska statutes, and the language "use and disposition" in the section dealing with excepted lands clearly take this Order out of the ordinary case.

Thus even without considering the effect of the words "settlement, location, sale or entry" it is crystal clear that the Order closed the lands to oil and gas leasing. However, as will appear from the following, these words, without more, were sufficient to so close the lands.

B. The Terms "Settlement, Location, Sale or Entry" in Both Executive Order No. 8979 and Public Land Order No. 487 Were Sufficient to Close the Lands to Leasing

Public Land Order No. 487 which the court of appeals held closed the lands embraced by Respondent Coyle's application provided in relevant part:

Subject to valid existing rights, the public lands within the following described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation: * * *

The phrase "settlement, location, sale, or entry" which appears in both this Order and Executive Order No. 8979, had through Congressional use and judicial construction become a phrase of art which included oil and gas leasing. The so-called Pickett Act²⁸ upon the authority of which Public Land Order No. 487 was expressly based contains virtually identical language:

The President may, at any time in his discretion; temporarily withdraw from *settlement, location,*

²⁸ 36 Stat. 847 (1910), 43 U.S.C. § 141 (1958).

sale or entry, any of the public lands of the United States, including Alaska. * * * (Emphasis added.)

The use of this language in both the Executive Order and the Public Land Order is obviously a paraphrase of the Pickett Act. It is a recognized historical fact that the Pickett Act was passed to ratify the President's withdrawal of the public lands known to be valuable for oil and gas deposits.²⁷ In *Wilbur v. United States ex rel Barton*, 46 F. 2d 217 (D.C. Cir. 1930), the Court of Appeals for the District of Columbia squarely rejected a contention that this language was not sufficient to include oil and gas leasing:

But it is insisted that the Act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry," and that the application for permit and lease which may follow discovery of oil under the Act of 1920 are not embraced within those terms. *It is apparent, we think, that the Act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.*

Under the Act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. This, we think, was akin to location or entry, as used in the act of 1910. (46 F. 2d at 220-221; emphasis added.)

²⁷ See *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). The President's request that Congress ratify his action is at 45 Cong. Rec. 621-22 (1910).

That decision was affirmed by this Court.²⁸ And in *Bordieu v. Pacific Western Oil Co.*, 299 U.S. 65 (1935) this Court construed an Executive Order containing language virtually identical to that in Public Land Order No. 487 to close the land to mineral leasing.

Thus it is obvious that this phrase alone is sufficient to close the lands to leasing, and that its use in Public Land Order No. 487 must be given that effect. That this was the intent of the Order is made even clearer by its references to Executive Order No. 8979:

This Order shall take precedence over, but shall not modify, * * * the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941.

And by the fact that, for the most part, it operated upon lands left open by the Executive Order.²⁹ It is also significant that paragraph 2 of Public Land Order No. 1212 which revoked Public Land Order 487 expressly withdrew certain lands "from all forms of appropriation under the public-land laws, including the mining, but not the mineral leasing laws" while paragraphs 6 and 7 opened certain lands and specifically included the mineral leasing laws. About 9 months later, the order was amended to delete references to the mineral leasing laws *only* in paragraphs 6 and 7. By retaining the express exception in paragraph 2, the

²⁸ *United States ex rel McLennan & Wilbur*, 283 U.S. 414, 419 (1931).

²⁹ Since the 1941 Executive Order provided that the excepted lands should remain part of the National Moose Range although open to use and disposition pursuant to the public land laws applicable to Alaska, the effect of Public Land Order No. 487 operating thereon was to place the land in the same status as the non-excepted closed area of the Range.

amendment brought the Order into conformity with the established practice of the time³⁰ as well as with the clear meaning of the language used. From this it appears that whatever the present construction of language such as appears in these Orders, the Department has not always been so consistent as the Government would have the Court believe. In fact, as we shall now demonstrate it appears that the construction and practice of the time these orders were issued was entirely consistent with the concept that such language withdrew lands from leasing.

C. A Contrary Administrative Construction of Similar Language Has Not Been Established

The Government relies almost entirely upon an asserted consistent administrative construction of the language of these orders. However, there is little positive evidence of this. In fact, most of the evidence is adverse to the Government's position.

The Government's claim that the Department has never construed the term "disposition" to include leasing rests almost entirely upon a 1921 Memorandum of the Solicitor, 48 I.D. 459.³¹ However, as we have pointed out, this Memorandum insofar as it considers a

³⁰ See discussion *infra* p. 34.

³¹ The quote from Mr. Hoffman's treatise contained at pp. 9-10 of the Government's brief is undoubtedly based upon this opinion, although no authority is given for the statement. In this connection it should be again noted that the language of Executive Order No. 8979 is unique in that the term "disposition" is qualified by parenthetical exception for fish trap sites and further explained as embracing "use" when read in *pari materia* with the provision covering the excepted area. Mr. Hoffman recognized that his statement is not categorical and the 1921 opinion did not consider the language of this order.

lease to be something other than a disposition, is at odds with the use of the term in the Mineral Leasing Act and its subsequent use by the courts. Furthermore, the 1921 Memorandum is contrary to the express holding of the court of appeals in *Wilbur v. United States ex rel. Barton*, 46 F. 2d 217, 220-221 (D.C. Cir. 1930), affirmed, 283 U.S. 414, 419 (1931), which holds that the words of the Pickett Act authorizing withdrawal from "settlement, location, sale or entry" even without the word "disposal" are sufficiently broad to accomplish a withdrawal of lands from leasing under the Mineral Leasing Act. See *supra*, pp. 29-30. In addition, the 1921 Memorandum is based upon a doctrinaire application of the rule *ejusdem generis* which is at odds with the limitation on that rule subsequently discussed by this Court in *Mason v. United States*, 260 U.S. 545, 553-555 (1923):

* * * it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, "or other form of appropriation," must be read in connection with the specific words "settlement and entry," immediately preceding; and that, so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. The words "settlement and entry," it is said, apply only to the act of settling upon the soil and making entry at a land office; as, for example, under the Homestead Laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this process is not covered by the words "other form of appropriation," limited, as they must be, by the associated specific words, to those forms of appropriation

which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of *construction*, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate . . . We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order, and consequently were prohibited by it." (*Id.* at 553-55).

Furthermore, until recently the 1921 memorandum has been virtually ignored by the Department. For example, an Order of the Acting Secretary dated September 26, 1933, withdrew certain lands from "all forms of disposition under the Public Land Laws",³² yet in 1945 it was thought necessary to amend this Order specifically to permit leasing.³³ Similar references to a lease as a disposition of land are frequent within the Department.³⁴

³² See *Mary E. Brown*, 62 I.D. 107, 108 (1955).

³³ 10 F.R. 11257 (1945).

³⁴ See *Devearl W. Dimond*, 62 I.D. 260 (1955) (Statute withdrawing lands from all forms of entry or disposal held to include leasing); *G.E. Kadance & Sons*, 65 I.D. 446 (1958) (Same); Bureau of Land Management Suspension Order of March 30, 1956, *infra* Appendix C. Cf. *J.G. Hatheway*, 68 I.D. 48, 51 (1961) (Refers to a lease as a disposition).

Nor is there any substantial support for the Government's claim of a consistent policy of specifically including oil and gas leasing in orders designed to close the lands to it. In the first place, a review of Executive Orders and Public Land Orders in general reveals that they often expressly provided that the land should be open to mineral leasing while using language similar to Executive Order No. 8979, Public Land Order No. 487, and the Pickett Act to effect the withdrawal.³⁵ From these orders it would appear that at least during the period which produced Orders 8979 and 487, it was a consistent practice to consider the words "settlement, location, sale or entry" as closing the lands to leasing and to expressly except the mineral leasing laws when that was the intent of the order. The case for such a practice is strengthened by the fact that in the same year Public Land Order No. 487 was issued, the Department held lands closed to leasing under an order which contained the words "settlement, location, sale or entry" and made no mention of the leasing laws.³⁶

Thus, it appears that by their clear language, those orders closed the lands to leasing. While the language of Order 487 is not as broad as 8979, the history of the language used and the obvious fact that the two Orders must be read together makes it clear that 487 was intended to preclude leasing. And it is difficult to imagine broader language than that contained in Executive Order No. 8979. Indeed, only by

³⁵ A list of withdrawal orders generally is contained in Respondents' Appendix D, Table 2; orders relating specifically to wildlife refuges are listed in Appendix D, Table 1.

³⁶ *D. Miller*, 60 I.D. 161 (1948). The Order involved was Executive Order No. 5214 (Oct. 30, 1929). The fact that this case was overruled some 7 years later by *Noel Teuscher*, 62 I.D. 210 (1955), does not detract from the construction given these words in 1948.

construing the Order as did the court of appeals can it be read as a meaningful and harmonious whole. To the contrary, the Secretary urges a construction which renders the exception for fish trap sites meaningless, ignores the usage given the word "disposition" by both Congress and the Courts, and which overlooks his own practice during the period as revealed in his decisions and orders. In defense of this construction, he argues that it is not an unreasonable one, and that this Court should defer to it. However, it is Respondents' understanding that judicial deference to the Secretary's construction of statutes and executive orders is something less than a grant of absolute power over the English language.³⁷ He may not, like Lewis Carroll's

³⁷ The court below approached the Executive Order and the Public Land Order with deference to the Secretary's construction of them. Still after full consideration of this and the subsequent regulations and notices that court was of the opinion that the Secretary's construction was "unreasonable and should not stand". The Government now argues that since the Secretary had the power to change the Executive Order at will, the entire question is one of form only. Such an argument is patently erroneous, for it assumes that the form of an order or a regulation is not at all important. This is not and never has been the rule, for while an administrative construction of words which may be changed at will must be given deference by the courts, that deference is not without its limit. At the very least it must not be plainly erroneous or inconsistent with that which is construed, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). If this rule is to have any substance at all, words with meanings established by judicial construction and Congressional use (and in accord with the administrative practice of the time which produced them) must be given those meanings. And clearly so long as the Orders were in effect the Secretary was bound to observe them. See *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955).

The Government insists on inflating the significance of this case by asserting that affirmance would void leases in the entire Kenai Range. This simply is not true, and when the case is placed in its proper perspective the importance of the administrative construction is accordingly diminished.

Humpty Dumpty, make words mean only what he chooses them to mean "neither more nor less".³⁸ These orders were published to inform the public of the status of the land. If the Secretary has the power to ignore the established usage of words as well as the practice of the time and over a decade³⁹ after their publication announce his own contrary construction of them, then the requirement of publication is an empty form.

III. THE POLICY WHICH PROMPTED THE CREATION OF THE RANGE AND THE SECRETARY'S PUBLIC ACTIONS SUBSEQUENT TO THE ORDERS ARE CONSISTENT WITH THE RANGE BEING CLOSED.

The basic purpose of the Kenai Moose Range was to protect "the natural breeding and feeding range of the giant Kenai moose" which presents "a unique wildlife feature" belonging to the people of the United States. In order to accomplish this purpose the President deemed it necessary to make an "across the water-front" withdrawal prohibiting every conceivable use of the area under the public land laws. As such, the Kenai withdrawal is quite different from other reservations for wildlife purposes which provide only that the lands shall be "reserved and set apart"⁴⁰ or which

³⁸ Carroll, COMPLETE WORKS OF LEWIS CARROLL 214. (Modern Library Ed.).

³⁹ As will appear in the following section, the Secretary made no public act that could possibly be considered inconsistent with the clear meaning of these Orders until 1956 when leases were issued in the Swanson River Unit, and even the issuance of those leases is consistent with the lands being closed by the Executive Order. Thus for all practical purposes there was no administrative construction of Public Land Order No. 487 while it was in effect, and none of the Executive Order until fifteen years after its promulgation. Even then the regulations and orders are wholly consistent with the range being closed.

⁴⁰ See e.g. Exec. Order No. 8116, 4 F.R. 1997 (1939); Exec. Order No. 8167, 4 F.R. 2410 (1939).

expressly permit oil and gas leasing.⁴¹ That there was to be no multiple purpose development of the closed area of the Kenai Range was made even more clear when the order prohibited leasing for fur farms and livestock grazing under the special Alaska statutes, which certainly would have been less inconsistent with protection of the giant Kenai moose than the commercial construction activity normally attendant the drilling of oil and gas wells on lands.⁴²

At the time that the representatives of major oil companies filed their lease offers between October 15, 1954 and January 28, 1955, there was no change in the published terms of the Executive Order of 1941 creating the Moose Range as supplemented by Public Land Order No. 487 of 1948. Not only did the express withdrawal language negative any indication of multiple development of the Kenai Range but at that time there were no protective procedures of any sort for multiple development of such closed areas. In fact, at that time it appears that even in all of the refuges owned by the United States throughout the country which were expressly open by their terms to mineral leasing, there had been only eleven leases issued, in spite of the procedures available for leasing open lands.⁴³ Since absolutely no procedures were available

⁴¹ See Table 1, Resp. Appendix D hereto.

⁴² For an example of the extent of surface operation, that may be required for oil and gas drilling, see *Kinney Coastal Oil Company v. Kieffer*, 277 U.S. 488 (1928). That extensive use of the surface in developed oil and gas fields may be required is a matter of common knowledge from developed fields in the United States. Certainly it is difficult to imagine the developed oil fields of Texas or other producing states as providing a conducive natural habitat for the rearing of moose.

⁴³ See H. Rept. No. 1941, 84th Cong., 2d Sess., pp. 5, 10 (1956).

for leasing closed portions of the Kenai Range, the oil company representatives in filing for the lands were pure speculators, gambling that they could acquire valuable rights in the nation's only giant moose reserve.⁴⁴

The next public statement by the Secretary regarding the Range, Public Land Order No. 1212 of September 9, 1955, made it clear that the excepted area withdrawn by Public Land Order No. 487 had been deemed closed to mineral leasing.

As noted previously this Order provided initially that a small portion of land (not involved here) was "withdrawn from all forms of appropriation, including the mining, *but not the Mineral Leasing Laws . . .*" (par. 2 Emphasis added). As to the bulk of the lands withdrawn, the Order, in paragraph 4, provided that it would not "otherwise become effective to change the status of the remaining lands" until a certain date and these lands would thereafter "become subject to settlement, *application*, petition and selection as follows." (Emphasis added.) The Order then established a

⁴⁴ It is clear, and the Government does not contend otherwise that the Regulations of October 29, 1947 (12 F.R. 7334; Pet. App. 3a) did not purport to open any refuges closed by the terms of the orders creating them and were applicable only to refuges in which leasing was possible.

The leases which petitioner alleges (based on its extra-record, ex parte investigation of Anchorage Land Office Records) were issued in the Kenai Range prior to this time (January 1955) were intended to be issued for lands completely outside the Moose Range. The extent of the speculation is further seen by the fact that even in 1958 when the Secretary finally acted with respect to the withdrawn area of the Kenai Range he kept a large portion of it closed. See *infra* p. 45.

schedule for disposal of the lands which terminated in paragraphs six and seven.

6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally, as may be authorized by the public-land laws, *including the mineral-leasing laws.* * * *

7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, *including leasing under the mineral leasing laws.* * * * (Emphasis added.)

It is clear that the language of this order contemplated that the lands upon which it operated had been closed to all forms of appropriation including leasing. Paragraph 2 made a positive withdrawal and expressly excepted the Mineral Leasing Laws. Paragraph 4 stated that the status of the lands (under Public Land Order No. 487) shall not be changed until a certain date and at that time shall become subject to, inter alia "application" (a term which obviously contemplates leasing)⁴⁵ and paragraphs six and seven fix the time at which the "status of the lands" would be changed so far as leasing is concerned. Thus, as the Government concedes in its brief, the Order seems "to be based on the premise that the lands had not been available

⁴⁵ See section 17 of the act, as amended 30 U.S.C. § 226 (e), 43 CFR § 192.44; 43 CFR § 295.8 defines the term "application" as including "offers to lease, filed pursuant to the regulations in any part of this chapter."

for leasing under Public Land Order No. 487" (Brief for petitioner p. 30), and as the Government also admits, any other construction gives rise to confusion. Thus, the only reasonable construction of this Order is that it returned the lands to the status created by Executive Order No. 8979, i.e., the bulk of the lands were closed to any form of disposition (which term includes leasing) and the remainder open. Any other construction clashes with the language of the Order. In short, Order 1212 did exactly what the Government admits it seemed to do; it opened previously closed lands to mineral leasing.

The Secretary's attempt to justify his asserted "consistent" construction of Public Land Order No. 487 by reference to the October 4, 1955, amendment to Order 1212 is wholly unconvincing. In the first place, if this amendment, which only deleted reference to the mineral leasing laws in paragraphs 6 and 7, was intended to point out that the lands had never been closed to leasing, it was done in a totally ineffective manner. No mention was made of the language in paragraph 4, which speaks in terms of changing the status of the lands and making them subject to application. In fact, the amendment had no effect whatsoever upon the Order except to make references to the mineral leasing laws in paragraph 2 consistent with the rest of the Order and with the practice then in vogue of specifically excepting the mineral leasing laws when wildlife refuges and ranges were closed to leasing by Pickett Act language.⁴⁶ No substantive change was made, apparently none was intended. The important thing about this amendment is not that it

⁴⁶ See Table 1, Appendix D, *infra*.

afforded "a dramatic reaffirmation of the Secretary's consistent interpretation of Public Land Order 487", but that it left unchanged an Order which when read in conjunction with Public Land Order 487 gives a clear notice that that portion of the range which it affected had been closed to leasing, just as Order 487 said it had. If the Secretary had wanted to give any other impression, surely he would have amended Section 4 as well, for it is from there that the contrary impression arises.

On December 8, 1955, the Secretary published a revision of his regulations governing the issuance of leases on wildlife refuges. The effect of this regulation upon the lands in question is not clear. One thing is clear, however, and it is that this regulation is not, as the Government contends, a reaffirmation of the pre-existing availability of the lands for leasing. This regulation contained two appendixes: Appendix A which listed refuges closed to leasing and Appendix B which listed refuges upon which leases could issue after the approval of an operating program. However, according to the then Secretary, some of the refuges in Appendix A had been open to leasing prior to that time⁴⁷ and Appendix B lists one area, the Salt Plains in Oklahoma, parts of which had prior thereto clearly been closed to leasing.⁴⁸ Thus, it is apparent that the

⁴⁷ 102 Cong. Rec. 260 (1956). The language of the orders creating the refuges are in no way similar to that of Executive Order No. 8979. On the contrary, they contain only general words of reservation such as "reserved and set apart." See, for example, Exec. Order No. 7593, March 3, 1937 (Okefenokee), Exec. Order No. 7023, April 22, 1935 (Red Rock Lakes), Exec. Order No. 3596, Dec. 22, 1921 (National Bison Range).

⁴⁸ Public Land Order No. 144, 8 Fed. Reg. 9430.

two lists had been compiled without regard to whether the refuges contained therein were opened or closed by the order which created them. This being so, the regulation is worthless as an indication of the pre-existing status of any lands.

Further, the 1955 regulation was not clear as to its applicability to the bulk of the withdrawn lands in the Kenai Moose Range (not in the excepted area). The 1955 regulation, in contrast to the revised regulations of 1958, in no way expressly indicated whether it was intended to cover all wildlife refuges, even those which by the terms of the order creating them were closed to oil and gas leasing. Appendix B expressly listed some portions within the withdrawn area of the Kenai Range as available for leasing but only on two conditions: (a) prior approval by the Director, Fish and Wildlife Service of a "complete and detailed operating program for the area, which will insure full protection of the particular values for which established" and (b) submission of such an operating program within 6 months failing which "all pending applications . . . will be rejected." Confusion as to the applicability of these Appendix B requirements arose when the Department apparently applied them to the issuance of a block of 31 leases in 1956 for the Swanson River Unit, which was not within the specified area set forth in Appendix B of the regulation.⁴⁰

⁴⁰ See *supra* pp. 8-10, and Resp. Appendix E hereto. In referring to the Swanson River Unit, the Government is building an argument based upon facts which are not a part of this record, an argument which depends upon the contents of records located in Alaska for verification. These leases were not mentioned in either the district court or the court of appeals, and if the Government in-

But while applying the Appendix B procedures to non appendix B lands to permit leasing of the Swanson River Unit, the Department inconsistently did not apply the further mandate of Appendix B to reject all pending applications for which an operating program was not filed within 6 months. Regardless of this inconsistency, however, it is clear that the Department treated the Swanson River Unit as specifically authorized by the 1955 regulation.

Thus the December 1955 regulations which did not specifically refer to the lands involved in this case are not clear whether (1) the regulations cover these lands at all; (2) even if covered, whether in view of the Department's action thereunder, they were to be treated under Appendix B procedures requiring a development plan in six months, failing which any applications must be rejected; or (3) leasing was otherwise authorized by the 1955 regulations. But regardless of how the inherent threefold ambiguity in the 1955 regulation is resolved, under none could it validate the 1954 and 1955 applications by the oil company representatives filed on the lands involved in this case prior to the issuance

tended to press such arguments at this stage, it should have made a proper record below.

The wisdom of disallowing these ex parte declarations of unproved fact is illustrated by a map which the oil companies attempted to submit to the court below (attached hereto as Appendix F). This map shows that except for the Swanson River Unit no leases were issued within the area withdrawn by Executive Order No. 8979 prior to 1958. See also H. Rep. No. 1941, 84th Cong. 2d Sess. p. 18 (1956) which contains a list of all leases issued in the Range prior to that date. This list does not include the lease which the Government asserts was issued in 1953. Furthermore, without a knowledge of where those leases were located, the fact of their issuance is meaningless. As we have pointed out some of the Range was never closed to leasing, and other parts were opened in 1955 by PLO 1212.

of the December 1955 regulation.⁵⁰ And one thing is crystal clear—other than the Swanson River Unit which was authorized only after approval of the complete detailed operating program for protection of wildlife required by Appendix B of the regulations, there was no other program for protection of the wildlife for the withdrawn area of the Moose Range prior to those specifically authorized by the Secretary in 1958. As the map submitted by the oil companies to the court of appeals shows,⁵¹ all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order or were in the Swanson River Unit, specifically treated as authorized by the Appendix B procedure of the 1955 regulation.⁵²

As previously noted the general regulation of January, 1958 (43 C.F.R. § 192.9) followed a comprehensive examination of all wildlife lands owned by the United States, regardless of whether they had been previously closed or open to oil and gas leasing. The language of the regulation is express on this point (*supra* p. 12). The Kenai lands were placed in the category of "Alaska wildlife areas" and provision was made for leasing them only if future specific agreements could be worked out between the Bureau of Land Management and the Fish and Wildlife Service

⁵⁰ It is noteworthy that a Congressional Committee investigating leasing practices in Wildlife refuges prior to 1956 reported a picture of "extreme administrative confusion", H. Rep. No. 1941, 84th Cong. 2d sess. p. 19 (1956), and the Chairman of that committee characterizes this report "most charitable" to the Secretary. 102 Cong. Rec. 5798 (1956).

⁵¹ See *supra*, note 49, pp. 42-43.

⁵² See Respondent's Appendix F hereto.

for the protection of wildlife. Obviously the requirement for such agreements was in keeping with the conservation policy expressed in the 1941 Executive Order; and the fact that an agreement was made a condition precedent to leasing in 1958 is further indication that the order of 1941 prevented it entirely.

After setting forth procedures for the publication of these agreements in the Federal Register, the regulation made an express provision for the processing of pending applications. This is an obvious reference to the general suspension order which had been in effect since 1953. This regulation refers to all wildlife areas, not just to Kenai, and must be read as a reference to all suspended applications pending on lands open to leasing. As regards Kenai there was a portion of the range that had never been closed to leasing and another portion that had been opened by Public Land Order 1212.

A few weeks thereafter the Secretary announced that he had approved a classification of the Range. The announcement emphasized that *opening* a portion of the Range was considered "entirely consistent with the primary purpose for which the range is managed." This announcement was followed by the order of August 2, 1958, which designated an area in the Southern part as "*not opened* to oil and gas leasing." (Emphasis added.) The northern lands opened by this order embraced both the area originally withdrawn by the 1941 order and the excepted area which was open but upon which leasing had been suspended. As in the regulation a provision was made for the processing of pending applications, but it is to applications pending on the excepted area that this provision refers.

The Order, which for the first time since its creation in 1941 clearly offered the withdrawn northern portion

of the Kenai Range for leasing was premised on the agreement consummated pursuant to and after the 1958 regulations between the Bureau of Land Management and the Fish and Wildlife Service determining which portion of the Range could be leased compatibly with its management for wildlife purposes.

The Respondents duly filed their offers in accordance with the procedures set out by the Secretary's Order of August 2, 1958.⁵³

In September, 1958, without any notice to Respondents, the Land Office issued the leases to the oil company representatives. A year later on September 4, 1959, the Land Office gave notice of a public drawing to determine priority among those filing pursuant to the August 2, 1958 Order, including Respondents (R. 18-26). A drawing was held pursuant to the drawing regulations⁵⁴ in which Respondents were selected as the first qualified applicants only to be advised by the Land Office in a decision dated October 7, 1959, that their lease offers were rejected.

Respondents as members of the public were entitled to rely on the clear meaning of the 1941 Executive Order creating the Moose Range as closed to oil and gas leasing under the public land laws. Certainly the Secretary's public actions subsequent to the 1941 Executive Order are consistent with this plain meaning. Until 1958 and the express regulations and Order

⁵³ Earlier in May of 1958 Respondents filed offers for the same lands involved in the present case, but these offers were rejected and returned to them by the Land Office on the ground that the lands were closed until after the Secretary issued an Order announcing consummation of the wildlife protection agreements.

⁵⁴ 43 C.F.R. 295.8.

issued by the Secretary clearly opening part of the withdrawn portion of the Range to oil and gas leasing only upon the consummation for the first time in early 1958 of an agreement by the Fish and Wildlife Service and Bureau of Land Management for the protection of the moose on the lands involved, no procedures existed whereby there could be any multiple development of these closed portions of the Range. Respondents alone complied with the procedures.

It is unreasonable to condone the action of the oil company representatives upon this wildlife preserve of the nation in filing speculative offers four years prior thereto in the face of the clear language of the Executive Order at a time when there were absolutely no safeguards or other procedures to protect the national breeding and feeding range of the giant Kenai moose, that "unique wildlife feature" which provided the whole *raison d'être* for the President's creation of the Range.

IV. CONGRESS NEITHER APPROVED NOR RATIFIED THE ISSUANCE OF THE LEASES WHICH CONFLICT WITH RESPONDENTS' APPLICATIONS.

The "Congressional ratification" of the Secretary's interpretation of the 1941 Executive Order which the Government urges is without foundation. The cases cited by the Government are totally inapposite to the situation here. The concept of Congressional ratification presupposes knowledge of the administrative practice and some affirmative action by Congress which unequivocally ratifies it, such as an appropriation for its support.⁵⁵ Obviously informal committee advice and

⁵⁵ See *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 119 (1947). Compare *Ex Parte Endo*, 323 U.S. 283, 303 (1944).

legislative inaction cannot constitute Congressional approval.⁵⁶ The most that can be said for those hearings in the 84th Congress which produced House Report No. 1941 is that they demonstrated to a Congressional committee that the leasing program on wildlife ranges generally was so confused that some supervision was necessary.⁵⁷

The subsequent hearings on the proposal to lease the Swanson River Unit at best demonstrate that there was some confusion within the Department over leasing on wildlife refuges. One assistant solicitor expressed a private opinion that Executive Order 8979 did not close the range to leasing.⁵⁸ However, the Committee had earlier heard from another assistant solicitor that the Secretary had the power to issue leases on lands expressly withdrawn from oil and gas leasing and had exercised that power.⁵⁹ That contention has apparently now been abandoned by the Department despite the fact that under the Government's theory it too was ratified

⁵⁶ Compare *Power Reactor Dev. Co. v. Electrical Union*, 367 U.S. 396, 409 (1961).

⁵⁷ See House Rep. No. 1941, 84th Cong. 2d Sess. pp. 10-11 (1956). The Committee was informed that leases had issued in the Kenai Range but there is nothing to indicate where those leases were located, and as a matter of fact none of them were intentionally within the area closed by Executive Order 8979.

⁵⁸ That opinion was based on the same Departmental cases upon which the Government now relies and which, as we have shown, are wholly without value in construing the order. See discussion *supra* pp. 31-34.

⁵⁹ See Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, 84th Cong. 2d Sess. p. 137 (1956). See also Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong. 2d Sess. pp. 67-68 (1956). In view of this assertion by a representative of the Department, it is no wonder that the Committee did not stop to inquire into the effect of the 1941 Executive Order.

by Congress. Finally it should be noted that the power of the Committee to "approve" leasing in the Kenai on behalf of Congress is doubtful and did not go unchallenged on the floor of Congress.⁶⁰

And so far as the Submerged Lands Act is concerned, neither that act or anything in its legislative history can be construed as "ratifying" an administrative construction of the 1941 Executive Order. The Committee was told of the oil strike on Kenai Range and of pending applications to lease other lands. But it does not follow that Congress intended to ratify every lease issued or every application then pending when it passed the Submerged Lands Act. On the contrary, Congress obviously was legislating without regard to the validity of any leases or pending applications to lease.

Finally, as we have pointed out, the existing leases in the Swanson River Unit were considered authorized by the 1955 regulation, and it is to these leases that the hearings on the bill refer. There were also excepted areas in the range and a number of leases had issued on them. Apparently there were also a number of applications to lease lands in these areas. The hearings do not indicate where the pending applications about which the Committee had been informed were located, and for all Congress knew they were on open lands. Furthermore, not only Congress but the public had been informed that that Secretary planned to lease parts of the Range. His announcement of January 1958 preceeded these hearings by about three months and the passage of the Act by about five. When these facts are considered the case for ratification vanishes.

⁶⁰ 102 Cong. Rec. 5588 (1956).

V. THERE IS NO INDISPENSABLE PARTY QUESTION IN THIS CASE.

The Government has waived any objection to the failure to join the lessees as indispensable parties and urges in its brief that the case be decided without noticing this issue (brief for petitioner p. 32). Having failed to raise the question at any stage of the proceedings below, the Government should not be allowed to do otherwise.⁶¹ Nor are the holders of the leases issued upon these lands in a position to assert this question for the first time.⁶²

If, however, the question is considered Respondents respectfully submit that the Court should hold the lessees not to be indispensable parties. Prior to the enactment of Public Law 87-748⁶³ it was possible to obtain review of Secretarial action such as this only in the District of Columbia,⁶⁴ and the Court of Appeals

⁶¹ See Fed. R. Civ. 12 (h); *Master Crafters Clock & Radio Co. v. Vacherow & Constantin-Le Coultre Watchers, Inc.*, 221 F. 2d 464, 462 (2d Cir. 1955), cert. denied 350, U.S. 832. The question does not go to the jurisdiction of the Court. *State of Washington v. United States*, 87 Fed. 421, 427 (9th Cir. 1936) and cases cited.

⁶² Although the absence of an indispensable party may be considered on appeal, the question is not one which categorically requires appellate notice. See *Haby v. Stanolind Oil & Gas Co.*, 225 Fed. 723 (5th Cir. 1955); 3 Moore's Federal Practice 2147 (2nd ed. 1963); 71 Harv. L. Rev. 877, 887 (1958). Here the holders of the leases had notice of the termination of the administrative proceedings and were on notice that review was possible in only one court in this country. Yet they made no effort to enter the case until after the decision in the court of appeals, although they had a clear right to intervene in such circumstances. The question should be considered waived as provided in the rule, cf. *Parker Rust Proof Co. v. Western Union Telegram Co.*, 105 F. 2d 976 (2d Cir. 1939).

⁶³ 76 Stat. 744 (1962), 28 U.S.C. §§ 1371, 1391 (e) (Supp. 1962).

⁶⁴ 62 Stat. 935 (1948), 28 U.S.C. § 139 (1958); *Thomas v. Union Pac. R.*, 139 F. Supp. 588, 596-97 (D. Colo. 1936), aff'd per curiam 239 F. 2d 641 (10th Cir. 1956).

for that circuit laid the question to rest in *Barash v. Seaton*, 256 Fed. 714, 718 (1958).⁶⁵

Judge Bazelon's decision in *Barash* cited this Court's decision in *Work v. Louisiana*, 269 U.S. 250, 254-255 (1925) which distinguished the old cases cited by petitioner. And in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300 (1902) this Court held that proposed lessees of oil lands need not be joined in a suit against the Secretary to restrain him from leasing oil lands held for the benefit of Indians.

The *Barash* case is alone consistent with this Court's decision last term in *Boesche v. Udall*, 373 U.S. 472 (1963), ruling that the Secretary of the Interior is possessed of administrative authority to cancel oil and gas leases on public lands for invalidity at their inception:

* * * We hold * * * that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land. (373 U.S. at 485)⁶⁶

⁶⁵ For a similar result see *McKay v. Wahlenmaier*, 226 F. 2d 36 (D.C. Cir. 1955) where the court ordered a lease issued by the Secretary in violation of his own regulations to be set aside regardless of the absence of the lessee (Culbertson) as a party to the judicial review proceedings.

⁶⁶ In *Boesche* only one of the "competing applicants for the same land" was before the Court. Cuccia and Conley, the adverse applicants to whom the Secretary had directed the issuance of a lease and the cancellation of Boesche's lease, were not parties to the judicial review proceedings.

Under the Departmental practice notice to the lessee is not a condition precedent to administrative cancellation, although the lessee may appeal to the Secretary. *Seaton v. The Texas Co.*, 256 F. 2d 718, 721 (D.C. Cir. 1958).

As has been noted, at the time this suit was brought, it could be brought only in the District of Columbia.⁶⁷ If the holder of an outstanding lease is always an indispensable party judicial review of the Secretary's decisions would have been frustrated in the great majority of cases arising under the old law, since leaseholders on public lands are seldom to be found within the District of Columbia. Furthermore, as the Government's brief points out, such a decision would run counter to the universal practice of naming only the agency in proceedings to review orders of administrative agencies.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals below should be affirmed.

Respectfully submitted;

CHARLES F. WHEATLEY, JR.
ROBERT L. McCARTY
McCARTY AND WHEATLEY
1201 Walker Building
Washington, D. C. 20005
Counsel for Respondents

October 1, 1964

⁶⁷ See note 64, *supra* p. 50.

RESPONDENTS' APPENDIX A**Executive Order No. 8979, December 16, 1941 (6 F.R. 6471)****EXECUTIVE ORDER****ESTABLISHING THE KENAI NATIONAL MOOSE RANGE****ALASKA**

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:

SEWARD MERIDIAN

Beginning at the point of intersection of the west boundary of the Chugach National Forest with the line of mean high tide on the south shore of Chickaloon Bay, in Turnagain Arm of Cook Inlet, in latitude 60°53' N., and longitude 150° W.;

Thence from said initial point;

Northwesterly with the meanders of the line of mean high tide, on the south shore of Chickaloon Bay to Point Possession;

Thence southwesterly with the meanders of the line of mean high tide on the east shore of Cook Inlet to the Kasilof River;

Thence southeasterly, upstream along the right bank of the Kasilof River to the meander corner on the south boundary of sec. 33, T. 3 N., R. 11 W., Seward meridian;

Thence west, 4.09 chains, to meander corner on south boundary of sec. 32, T. 3 N., R. 11 W.;

Thence southwesterly, along the crest of the watershed, to the divide between the waters flowing into Tustumena Lake and the waters flowing into Cook Inlet and Kachemak Bay;

Thence southeasterly, along said divide to the confluence of the Fox River and the principal stream flowing from Dingiestadt Glacier;

Thence southeasterly, up said stream and across Dinglestadt Glacier to the crest of Kenai Mountains;

Thence northeasterly, along the crest of Kenai Mountains to the west boundary of Chugach National Forest at a point three miles southeasterly from the head of Upper Russian Lake;

Thence northerly, along the west boundary of Chugach National Forest to the place of beginning.

The area described, including both public and non-public lands, aggregates 2,000,000 acres.

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March

4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: *Provided, however*, That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska; *Provided further*, That the lands in the said excepted areas shall be classified by the General Land Office, Department of the Interior, and those lands classified as not suitable for settlement shall no longer be available for that purpose: *Provided further*, That the reservation for the national moose range shall not operate to prevent the construction and operation of a highway to connect the area open to settlement with the Seward-Sunrise road by the most practicable route: *Provided further*, That any lands within the described area that are otherwise withdrawn or reserved shall be affected by this order only so far as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made.

The provisions of this order shall not prohibit the hunting or taking of moose and other game animals and game birds or the trapping of fur animals in accordance with the provisions of the said Alaska Game Law, as amended, and as may be permitted by regulations of the Secretary of the Interior prescribed and issued pursuant thereto.

This reservation shall be known as the Kenai National Moose Range.

FRANKLIN D. ROOSEVELT
The White House,
December 16, 1941.

[No. 8979]

RESPONDENTS' APPENDIX B**Public Land Order No. 487, June 18, 1943 (13 F.R. 3462)****[Public Land Order 487]****ALASKA****WITHDRAWING PUBLIC LANDS FOR CLASSIFICATION AND EXAMINATION AND IN AID OF PROPOSED LEGISLATION**

By virtue of the authority vested in the President by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 U.S.C. Title 43, secs. 141-143), and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the public lands within the following described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:

KENAI-KASLOF AREA**SEWARD MERIDIAN**

- Tp. 5 N., Rs. 8 & 9 W.,
T. 4 N., R. 10 W., unsurveyed,
Secs. 4 to 9, inclusive;
Sec. 18.
- T. 5 N., R. 10 W.,
T. 6 N., R. 10 W.,
Secs. 30 & 31.
- T. 2 N., R. 11 W., unsurveyed,
Secs. 4 to 8, inclusive.
- T. 3 N., R. 11 W.,
Sec. 3, unsurveyed;
Secs. 4 to 9, inclusive;
Sec. 10, unsurveyed;
Secs. 16 to 21, inclusive;
Secs. 28 to 33, inclusive.

T. 4 N., R. 11 W., partly unsurveyed.

T. 5 N., R. 11 W.

T. 6 N., R. 11 W.,

Secs. 22 to 36, inclusive.

T. 2 N., R. 12 W.,

Sec. 1, unsurveyed;

Secs. 2, 3, 4, 9 and 10;

Secs. 11 and 12, unsurveyed.

Tps. 3, 4 and 5 N., R. 12 W.

T. 6 N., R. 12 W.,

Secs. 2 and 3;

Secs. 11 to 14, inclusive;

Secs. 23 to 26, inclusive;

Secs. 35 and 36.

The areas described aggregate 169,974 acres, including public and non-public lands.

• • • • •

This order shall take precedence over, but shall not modify, the withdrawal for classification for national-monument purposes made by Executive Order No. 7888 of May 16, 1938; the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941; the withdrawal for administrative site purposes made by Public Land Order No. 390 of August 4, 1947; and the withdrawals for air-navigation site purposes made by the orders of the Secretary of the Interior dated March 17, 1941, and October 10, 1942 (Air-Navigation Site Withdrawal No. 156), and the order of the Secretary of the Interior dated May 26, 1948 (Air-Navigation Site Withdrawal No. 248).

C. GIRARD DAVIDSON,

Acting Secretary of the Interior.

June 16, 1948.

[F. R. Doc. 48-5612; Filed, June 23, 1948; 8:46 a.m.]

6a

RESPONDENTS' APPENDIX C
BLM Suspension Action, March 30, 1956

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

TELETYPE

March 30, 1956

**IDENTICAL TELETYPE TO EACH
ADDRESS ON ATTACHED LIST
THE SUSPENSION TO APRIL 2, 1956, OF DISPOSITION BY LEASE OR
OTHERWISE OR THE GRANTING OF ANY USE OF LANDS IN FISH
AND WILDLIFE REFUGES, GAME RANGES AND OTHER LANDS
UNDER JURISDICTION OF FISH AND WILDLIFE SERVICE IS CON-
TINUED UNTIL FURTHER NOTICE. THIS DOES NOT SUSPEND ALL
PRELIMINARY ACTION WHICH SHOULD CONTINUE TO BE TAKEN.
THE SUSPENSION APPLIES ONLY TO FINAL ACTIONS IN SUCH
MATTERS.**

/S/ Edward Woozley
WOOLEY

Copy to:

Eastern States Office
Geological Survey
Donald Chaney, Solicitor's Office
John Farley, Fish and Wildlife Service
BLM Reading File
M Reading File

RESPONDENTS' APPENDIX D

Table 1

Executive and Public Land Orders Creating Wildlife Refuges Issued Between 1937 and 1959 Which Expressly Permit Leasing. Generally, the Language of Withdrawal is Similar to That of the Pickett Act.

	Order	Date	Citation
1. Executive Order No.	7373	5/20/36	1 F. R. 428
2.	7522	12/21/36	2184
3.	7833	3/ 7/38	3 F. R. 520
4.	7983	9/19/38	2389
5.	8038	1/25/39	4 F. R. 391
6.	8039	1/25/39	391
7.	8592	11/12/40	5 F. R. 4478
8. Public Land Order No.	243	9/ 6/44	9 F. R. 11400
9.	252	12/ 6/44	14649
10.	286	6/26/45	10 F. R. 8559
11.	319	5/13/46	11 F. R. 5746
12.	817	4/14/52	17 F. R. 3495
13.	866	9/23/52	8653
14.	1435	6/22/57	22 F. R. 4418
15.	1512	10/ 2/57	7786
16.	1584	2/13/58	23 F. R. 947
17.	1597	3/13/58	1734
18.	1634	5/17/58	3403
19.	1636	5/20/58	3403
20.	1766	12/19/58	9782
21.	1942	8/12/59	24 F. R. 6713

Table 2

Withdrawal Orders Issued Between 1937 and 1955 Which Expressly Permit Mineral Leasing While Using Language Similar to Executive Order No. 8979 or Public Land Order No. 487 to Effect the Withdrawal.

	Order	Date	Citation
1. Executive Order No.	7616	5/13/37	2 F. R. 835
2.	7662	7/17/37	1251
3.	7669	7/19/37	1261
4.	7670	7/19/37	1262
5.	7671	7/19/37	1262
6.	7672	7/19/37	1263
7.	7673	7/19/37	1264
8.	7674	7/19/37	1265
9.	7675	7/21/37	1283
10.	7693	8/19/37	1430
11.	7734	11/ 1/37	2414
12.	7760	12/ 3/37	2679
13.	7866	4/14/38	3 F. R. 764
14.	7867	4/15/38	764
15.	8459	6/27/40	5 F. R. 2435
16. Public Land Order No.	243	9/ 6/44	9 F. R. 11400
17.	252	12/ 6/44	14649
18.	264	3/ 5/45	10 F. R. 2886
19.	278	5/21/45	6313
20.	286	6/26/45	8559
21.	295	10/ 9/45	13076
22.	300	10/25/45	13720
23.	309	1/ 5/46	11 F. R. 533
24.	319	5/15/46	5746
25.	330	11/ 6/46	13638
26.	338	1/ 7/47	12 F. R. 398
27.	433	12/26/47	13 F. R. 321
28.	459	3/31/48	1763
29.	494	7/ 6/48	3870
30.	498	7/13/48	4189
31.	503	2/27/48	4481
32.	519	8/30/48	5312
33.	549	1/31/49	14 F. R. 546
34.	550	2/ 4/49	695
35.	552	2/ 4/49	797
36.	560	2/11/49	858
37.	564	2/21/49	958
38.	567	2/25/49	1006
39.	574	3/25/49	1501
40.	575	3/29/49	1520

9a

	Order	Date	Citation
41. Public Land Order No.	622	12/15/49	14 F. R. 7646
42.	633	2/ 6/50	15 F. R. 740
43.	643	5/ 9/50	2877
44.	644	5/ 9/50	2877
45.	648	6/ 5/50	3623
46.	698	2/12/51	16 F. R. 1638
47.	699	2/12/51	1639
48.	702	3/ 5/51	2234
49.	725	6/ 4/51	5444
50.	734	7/20/51	7329
51.	735	7/26/51	7571
52.	736	7/27/51	7871
53.	741	8/ 9/51	8113
54.	742	8/ 9/51	8184
55.	745	8/16/51	8465
56.	752	9/ 7/51	9316
57.	753	9/14/51	9569
58.	758	10/22/51	10948
59.	759	10/22/51	10948
60.	760	10/22/51	10948
61.	766	11/23/51	12095
62.	768	12/12/51	12703
63.	769	12/12/51	12703
64.	773	12/19/51	13095
65.	779	12/29/51	17 F. R. 160
66.	797	1/25/52	925
67.	811	3/ 7/52	2132
68.	817	4/14/52	3495
69.	829	5/16/52	4709
70.	831	5/21/52	4711
71.	832	5/21/52	4822
72.	839	6/19/52	5731
73.	845	6/24/52	5909
74.	846	6/26/52	5992
75.	866	9/23/52	8653
76.	891	4/21/53	18 F. R. 2294
77.	904	7/10/53	4048
78.	908	7/31/53	4659
79.	909	7/31/53	4659
80.	914	8/27/53	5295
81.	915	9/23/53	6242
82.	918	10/ 8/53	6565
83.	920	10/12/53	6635
84.	960	4/30/54	19 F. R. 2670
85.	962	5/10/54	2781
86.	964	5/13/54	2899
87.	973	6/18/54	3840

	Order	Date	Citation
88. Public Land Order No.	977	6/23/54	19 F. R. 3989
89.	979	6/25/54	4033
90.	983	7/22/54	4632
91.	989	8/10/54	5179
92.	990	8/11/54	5179
93.	993	8/16/54	5333
94.	1003	9/ 3/54	5866
95.	1008	9/ 8/54	5929
96.	1011	9/21/54	6227
97.	1014	10/ 1/54	6477
98.	1015	10/ 1/54	6477
99.	1028	12/ 4/54	7296
100.	1040	12/22/54	9278
101.	1046	12/28/54	20 F. R. 53
102.	1052	1/12/55	400
103.	1054	1/18/55	548
104.	1055	1/18/55	548
105.	1057	1/19/55	549
106.	1058	1/19/55	549
107.	1059	1/21/55	618
108.	1060	2/26/55	687
109.	1073	2/18/55	1176
110.	1074	2/18/55	1176
111.	1079	2/25/55	1313
112.	1080	2/28/55	1362
113.	1082	3/ 4/55	1438
114.	1089	3/10/55	1584
115.	1091	3/10/55	1610
116.	1094	3/15/55	1660
117.	1095	3/15/55	1660
118.	1098	3/17/55	1778
119.	1110	3/31/55	2172
120.	1112	4/ 5/55	2310
121.	1119	4/12/55	2576
122.	1120	4/12/55	2576
123.	1122	4/12/55	2576
124.	1144	5/ 4/55	3151
125.	1155	5/27/55	3876

RESPONDENTS' APPENDIX E

Aug. 7 - 1956)

MEMORANDUM

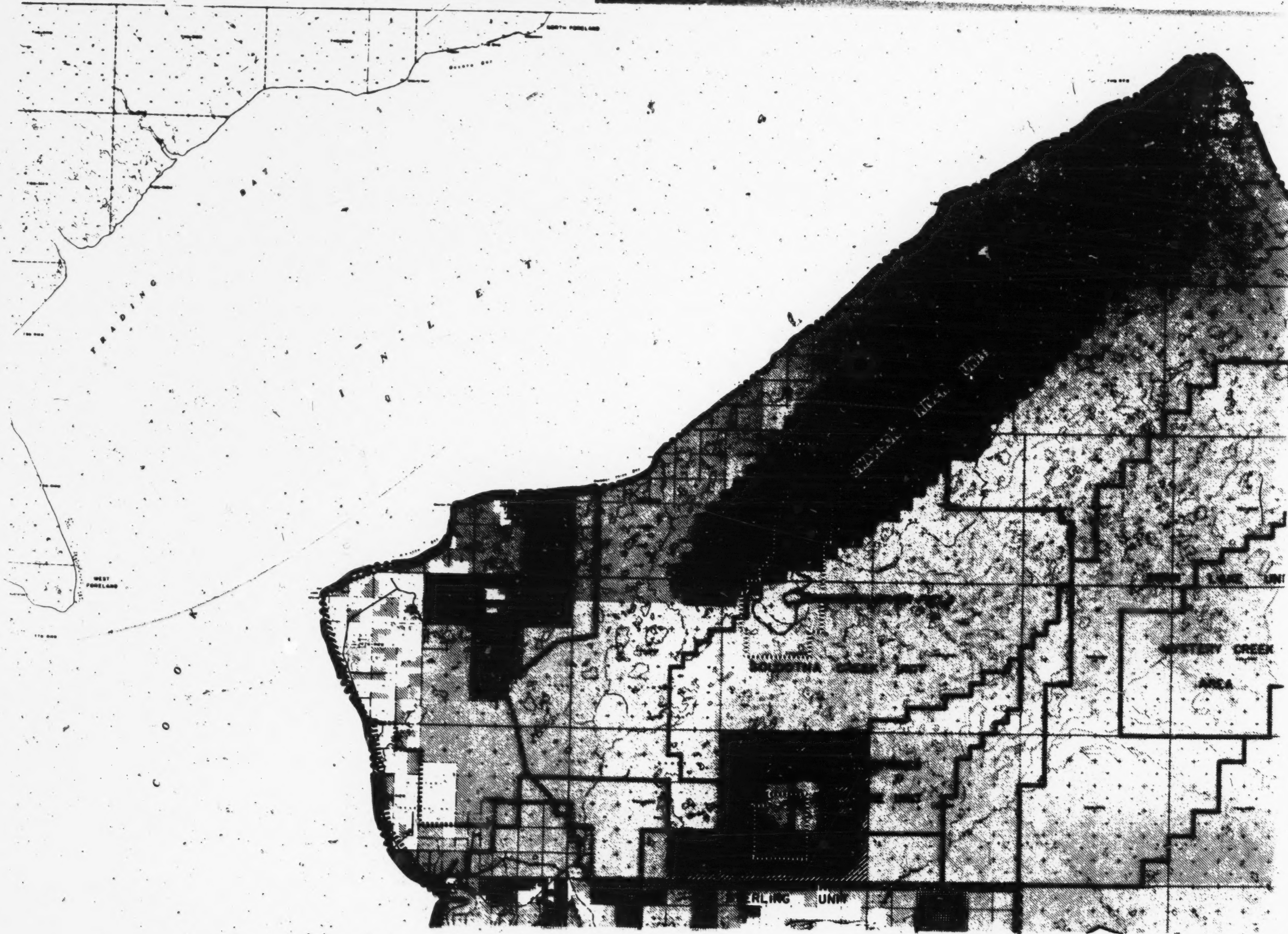
To: Director, Bureau of Land Management
From: Director, Fish and Wildlife Service
Subject: Kenai National Moose Range—Operating
Program—Richfield Oil Corporation

In accordance with the provisions of 43 CFR 192.9 (Circular 1945) an operating program has been approved by this Service, copy attached, for operations in the Swanson River Unit Area, Territory of Alaska, under Contract No. 14-08-001-2969 that was approved by the Geological Survey on July 31, 1956.

Oil and gas leases may be issued for the lands of the Kenai National Moose Range that are included within the said unit area, provided the lessees comply with the requirements of the operating program.

(SGD) JOHN L. FARLEY

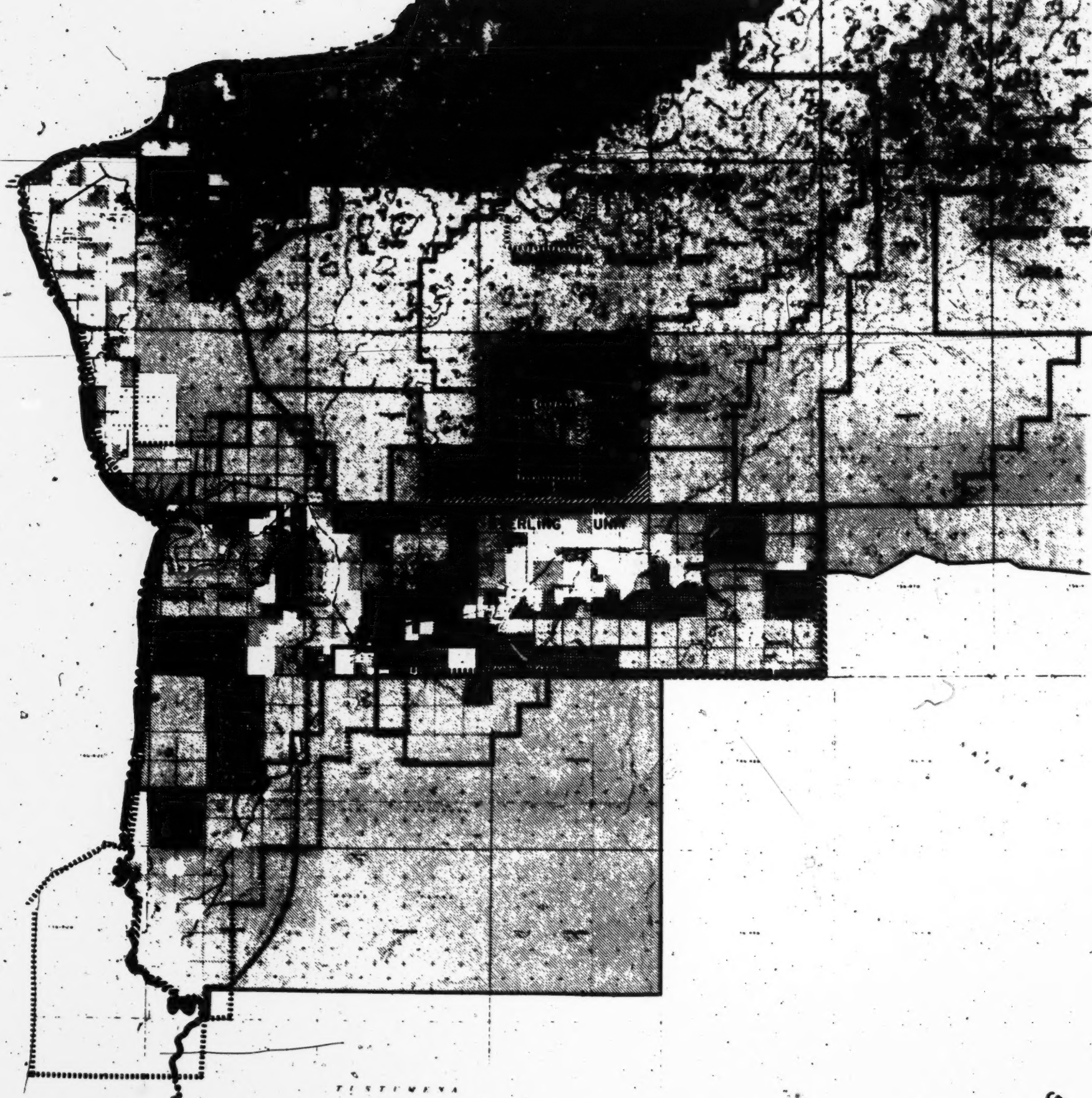
Attachment,



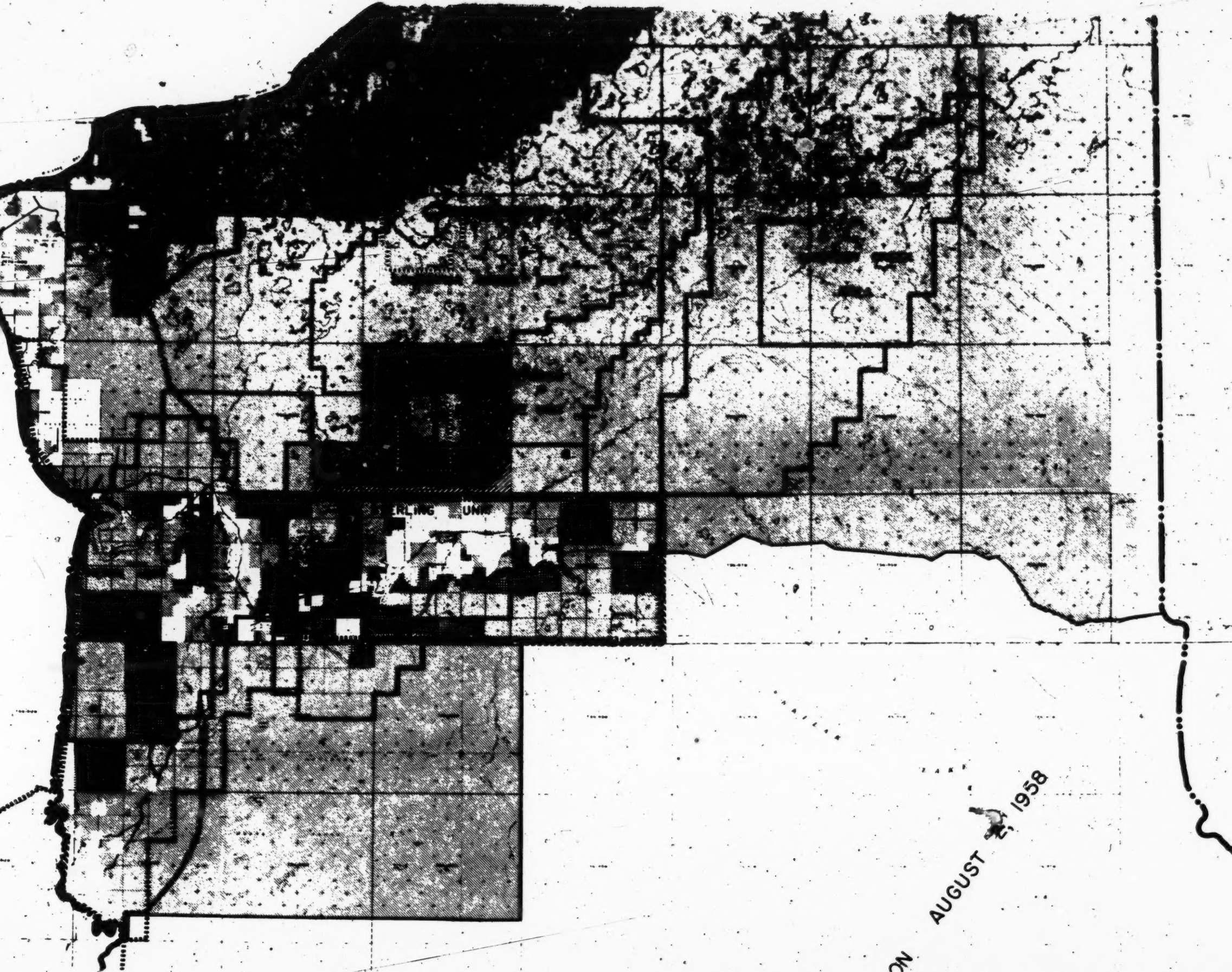
RESPONDENTS' APPENDIX F



WEST
POWELL



TISTIMAYA



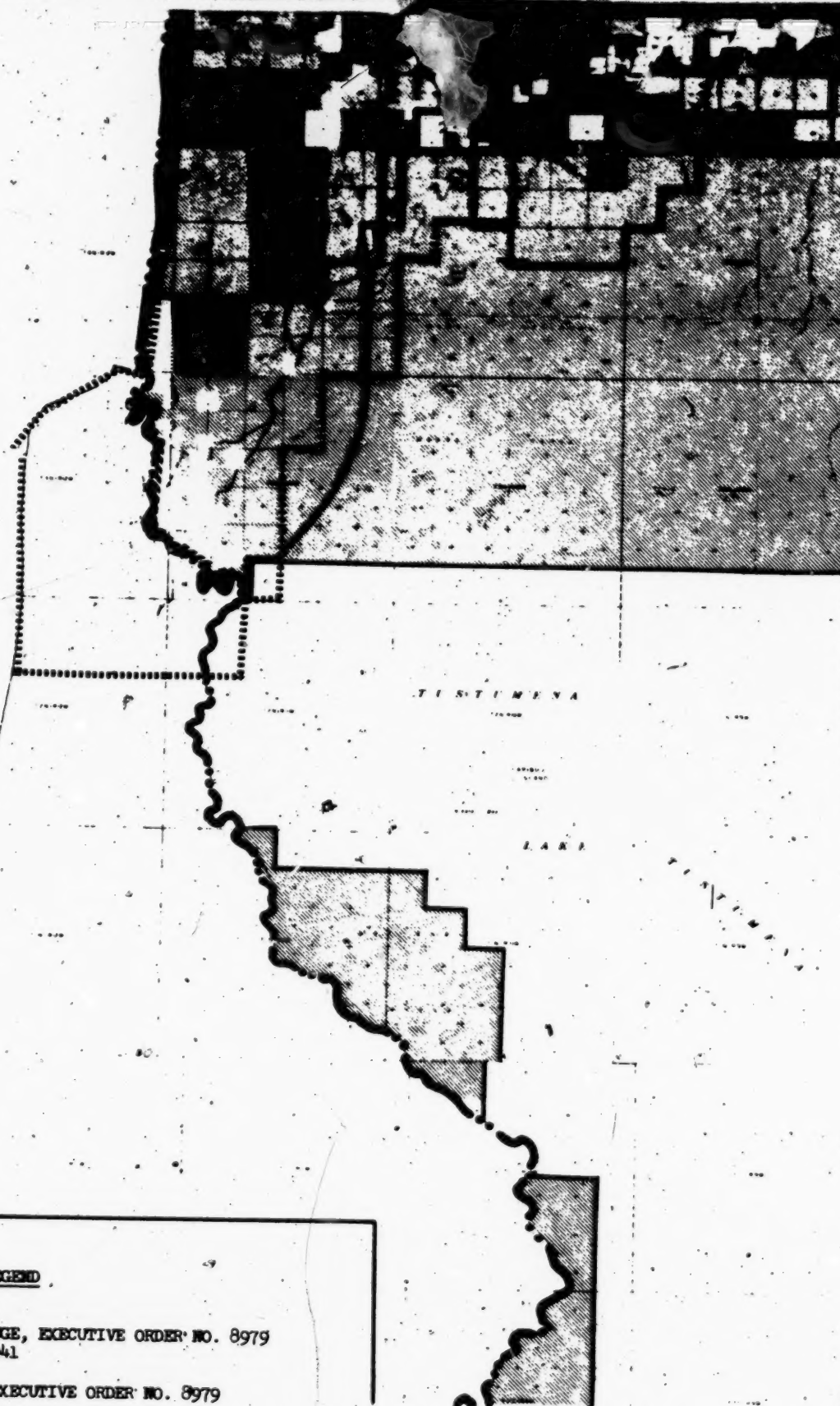
NC
AUGUST 2, 1958

LEGEND

———— KENAI MOOSE RANGE, EXECUTIVE ORDER NO. 8979
DECEMBER 16, 1941

////// EXCEPTED FROM EXECUTIVE ORDER NO. 8979

AREA CLOSED TO MINERAL LEASING ON AUGUST 2, 1941

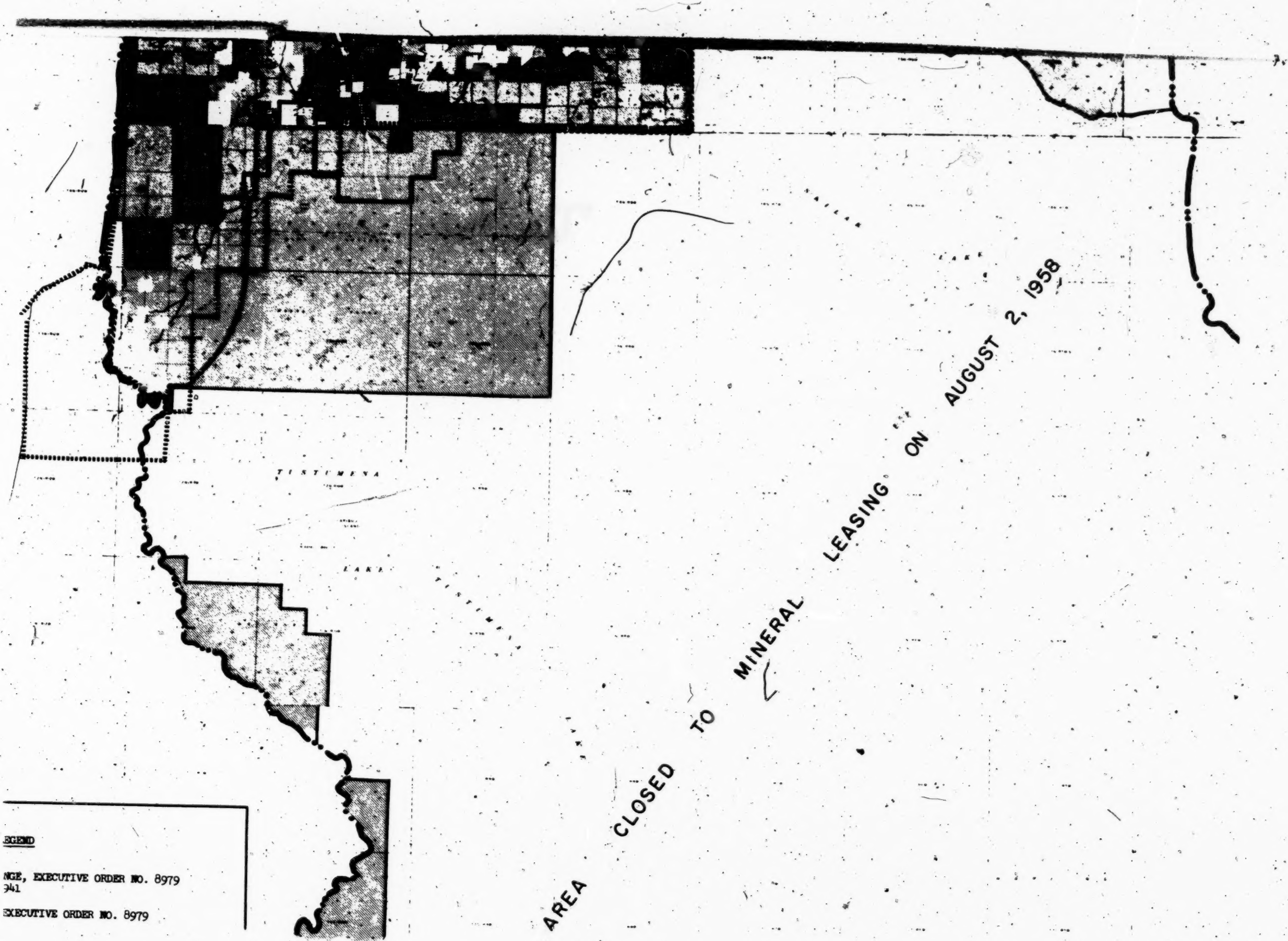


LEGEND

NGE, EXECUTIVE ORDER NO. 8979
941

EXECUTIVE ORDER NO. 8979

AREA CLOSED TO MINERAL LEASING ON AUGUST 2, 1958



LEGEND

- KENAI MOOSE RANGE, EXECUTIVE ORDER NO. 8979
DECEMBER 16, 1941
- ~~~~~ EXCEPTED FROM EXECUTIVE ORDER NO. 8979
- WITHDRAWN BY PUBLIC LAND ORDER 487
MODIFIED BY PUBLIC LAND ORDER 1212
- KNOWN GEOLOGICAL STRUCTURE (U.S.G.S.)
- LAND LEASED PURSUANT TO OFFERS MADE PRIOR TO
AUGUST 14, 1958 AND ISSUED AFTER SEPTEMBER 1, 1958
APPROX. 784,000 ACRES
- LAND SUBJECT TO TALLMAN GROUP OFFERS
- LEASES ISSUED PRIOR TO AUGUST 2, 1958
APPROX. 129,000 ACRES
- * PRODUCING GAS WELL
- WELL LOCATION MAPTOWNE UNIT

0 5 10

SCALE IN MILES

AREA CLOSED TO MINERAL LE

AREA CLOSED TO MINERAL LE

VE ORDER NO. 8979
DER NO. 8979
DER 487
DER 1212
(U.S.S.S.)
PERS MADE PRIOR TO
AFTER SEPTEMBER 1, 1958
GROUP OFFERS
JUNE 2, 1958
IT
10

EXH

EXHIBIT "d"

INDEX

I. The Court may take judicial notice of the official public records of the Anchorage land office-----	Page 1
II. Respondents' explanation of the leasing actions is specious and incomplete-----	4
A. The 1955 regulation and the leasing of the Swanson River Unit-----	4
B. Other leasing actions-----	17
III. The cases cited do not support respondents' construction of "settlement, location, sale or entry" as including mineral leasing--	20
IV. Miscellaneous-----	26
Conclusion-----	33
Appendix:	
Letter from Manager, Anchorage land office-----	1a
Affidavit of Manager, Anchorage land office-----	3a
Schedule I: Oil and gas leases issued in the area within Kenai National Moose Range which was withdrawn from settlement by Executive Order 8979:	
A. Leases issued prior to January 8, 1958-----	4a
B. Leases issued after August 14, 1958, on applications filed prior to January 8, 1958.----	5a

Appendix—Continued

Affidavit of Manager, etc.—Continued

Schedule II: Leases issued in the area within the Kenai National Moose Range, excepted from Executive Order 8979, but withdrawn from settlement by Public Land Order 487:

A. Leases issued prior to September 9, 1955----- Page 11a

B. Leases issued after September 9, 1955 on applications filed prior to that date----- 11a

Schedule III: Leases issued in the area within Kenai National Moose Range which was not withdrawn from settlement either by Executive Order 8979 or by Public Land Order 487, pursuant to offers filed prior to August 14, 1958----- 13a

CITATIONS

Cases:

<i>Bourdieu v. Pacific Oil Co.</i> , 299 U.S. 65-----	21, 25
<i>Brown, Mary E.</i> , 62 I.D. 107-----	32
<i>Caha v. United States</i> , 152 U.S. 211-----	2
<i>Dimond, Devearl W.</i> , 62 I.D. 260-----	32
<i>Kadane, G. E., & Sons</i> , 65 I.D. 446-----	32
<i>Knight v. U.S. Land Ass'n</i> , 142 U.S. 161--	2
<i>Miller, D.</i> , 60 I.D. 161-----	32
<i>Tampa Electric Co. v. Nashville Co.</i> , 365 U.S. 320-----	2
<i>Teuscher, Noel</i> , 62 I.D. 210-----	32
<i>Towne v. Eisner</i> , 245 U.S. 418-----	24
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459-----	21

III

Cases—Continued

<i>Wilbur v. Barton</i> , 46 F. 2d 217, affirmed, 283 U.S. 414-----	Page 21, 23
Statutes, regulations, and orders:	
Act of August 21, 1935, 49 Stat. 676-----	22
Act of August 8, 1946, 60 Stat. 950-----	33
Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181 <i>et seq</i> -----	16, 21, 22, 23, 24, 26, 32
Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141-----	22, 23, 24, 25
Taylor Grazing Act of June 23, 1934, § 6, 48 Stat. 1272, 43 U.S.C. 315e-----	31
Regulations of the Department of Interior:	
43 C.F.R. 192.9-----	6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 30
43 C.F.R. Part 71-----	26
Executive Order No. 8979, 6 F.R. 6471-----	3, 4, 6, 13, 14, 15, 16, 17, 18, 19, 20, 27, 29, 30
Executive Order No. 9337, 8 F.R. 5516-----	26
Executive Order No. 10355, 17 F.R. 4831-----	14
Order of August 2, 1958, 23 F.R. 5883-----	29, 30
Public Land Order No. 144, 8 F.R. 9430-----	16
Public Land Order No. 487, 13 F.R. 3462-----	3, 4, 18, 19, 20, 25, 26, 28, 31
Public Land Order No. 751, 16 F.R. 9044-----	32
Public Land Order No. 778, 17 F.R. 159-----	32
Public Land Order No. 1212, 20 F.R. 6795, 7904-----	3, 28, 31
Miscellaneous:	
34 Op. A.G. 171-----	32

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

**STEWART L. UDALL, SECRETARY OF THE INTERIOR,
PETITIONER**

v.

JAMES K. TALLMAN, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY BRIEF FOR THE PETITIONER

I

**THE COURT MAY TAKE JUDICIAL NOTICE OF THE OFFICIAL
PUBLIC RECORDS OF THE ANCHORAGE LAND OFFICE**

In our opening brief, as in our petition for certiorari and reply, we summarized the leases that had been issued in the several parts of the Moose Range at the relevant times, stating that the data was based on the records of the Anchorage land office. Despite their ready access to those records,¹ respondents do

¹ The records are, it is true (Resp. Br. 42 n. 49), located in Alaska, but respondents Tallman and Bell are lawyers practicing in Anchorage (R. 3; Richfield-Standard Br. ii-iii) and Tall-

not challenge the accuracy of the facts stated. They repeatedly complain, however, of our making reference to matters not introduced into evidence (Br. 7 n. 2, 10, 11, 38 n. 44, 42 n. 49). We may ignore the double standard respondents would invoke,² for it is clear in any event that the Court may take judicial notice of the official public records of the Anchorage land office upon which the data given was based. See, e.g., *Knight v. U.S. Land Ass'n.*, 142 U.S. 161, 169; *Caha v. United States*, 152 U.S. 211, 222; *Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320, 332. And to remove any doubts about the accuracy of the data—although it is not specifically challenged by respondents—we have filed with the Clerk and reprinted as an appendix to this brief an affidavit by the Manager of the Anchorage land office. Schedules appended to the affidavit list—with the serial number, date of fil-

man has in fact visited the Anchorage land office to examine the records in connection with this case (see p. 2a, *infra*). In addition, we informally offered to furnish respondents with a list of the leases to which reference was made and to aid them in verifying any items about which they had any question. If respondents are ignorant of the accuracy of the data, it is only because they choose to remain so.

² That nothing in the record (or elsewhere) supported the statement did not dissuade respondents from telling the court of appeals that "No leases issued for any lands within the Kenai Range between 1941 and 1958" (C.A. Br. 30) and that the 1957 discovery of oil (in the Swanson River Unit) was "outside of the Kenai National Moose Range" (C.A. Br. 40).

ing, date of issuance, acreage, location, and a reference to the records containing the information—all of the relevant leases issued in the Range as shown on the official public records of that office.³

³ There are, not surprisingly, minor discrepancies between the data we previously gave the Court and the result of the final (and more accurate) tabulation by the Anchorage land office. A comparison of the data shown by the schedules in the appendix with that given in our opening brief follows:

In the area withdrawn from settlement by Executive Order 8979, the number of leases issued *prior to 1958* was 37 covering 75,446 acres (Sch. I(A)) rather than 36 covering 74,986 acres (Br. 12). The number issued *after 1958* on pre-1958 applications was 294 covering 621,234 acres (Sch. I(B)) rather than 302 covering 663,281 acres (Br. 12). The total for the two periods is 331 leases covering 696,680 acres (Sch. I) rather than 338 covering 738,267 acres (Br. 13, 33 n. 36).

In the area excepted from the Executive Order but withdrawn from settlement by Public Land Order 487, our statement (Br. 30, n. 32) that two leases were actually issued before that order was revoked by Public Land Order 1212 (September 9, 1955) was correct, although the acreage (441 acres) is perhaps insignificantly small (Sch. II(A)). The total number of leases issued on applications *filed* before the revocation was 74 covering 116,878 acres (Sch. II(A) and (B)) rather than 71 covering 124,251 acres (Br. 30 n. 32, 33 n. 36).

The total acreage in the two areas that was improperly leased if the decision below is correct is thus 813,558 (Sch. I and II) rather than 862,000 (Br. 33). For the sake of completeness, though it has no relevance to the case, the total acreage leased in the part of the Range that was not withdrawn from settlement by either order (on pre-1958 applications) was 57,425 acres (Sch. III) rather than "some 55,000" acres (Br. 33-34 n. 36).

The leases the validity of which is challenged in this case are items 47, 48, 94-97, 99-102, and 243 of Schedule I(B) and items 26, 48, 55, 56, 69, and 70 of Schedule II(B).

II

**RESPONDENTS' EXPLANATION OF THE LEASING ACTIONS IS
SPECIOUS AND INCOMPLETE**

**A. THE 1955 REGULATION AND THE LEASING OF THE SWANSON
RIVER UNIT**

As to nine of the ten respondents (i.e., all except respondent Coyle), the sole question is the availability for oil and gas leasing of the area withdrawn from settlement in 1941 by Executive Order 8979.⁴ As to that area, the fact that respondents understandably find the most embarrassing is that in 1956 the Department in fact issued 31 leases covering 71,680 acres (over 100 square miles) in that part of the Range (Sch. I(A), items 7-37). Those leases, known as the Swanson River Unit, were issued with the prior approval, following public hearings, of the House Committee on Merchant Marine and Fisheries (see Pet. Br. 16). It was in the area so leased that a major oil discovery was made in 1957. And all of that occurred *prior* to 1958 and thus during the period that respondents contend, and the court below held, that the area was "closed" to leasing by the terms of the Executive Order.

⁴Public Land Order 487, issued in 1948, and the order which revoked it in 1955 (Public Land Order 1212) applied to an entirely separate area and are relevant only to respondent Coyle's case. The confusion generated by respondents' brief (and reflected in the court of appeals' opinion) is attributable in large part to their refusal, either in their statement or in their argument, clearly to separate the orders and facts relevant to the different respondents.

Throughout the litigation of this case, respondents have striven to explain away the Swanson River Unit leases. In the court of appeals, they simply asserted as a fact that the leases were not within the boundaries of the Moose Range (see note 2, *supra*). When the demonstrable error of that assertion was pointed out in our petition, respondents next asserted that the Swanson River Unit leases were within an area "expressly designated" in the 1955 regulation in which leasing was "specifically authorized" as an exception to the alleged general prohibition (Br. in Opp. 8; 7, 13, 15). In reply we showed that the Swanson River Unit was not within miles of any of the areas "expressly designated" in the 1955 regulations (Reply to Br. in Opp. 2-3). Their two prior explanations having been exposed as groundless, respondents now assert, with equal assurance, that, while the Swanson River Unit "apparently" was not within the area specified in the 1955 regulation, it was nevertheless "in fact treated" by the Department as "governed by" the provisions applicable to the areas which were so specified (Br. 10; 9, 11, 12, 41-44, 49).

⁵ In a footnote, respondents begrudgingly acknowledge that the Swanson River Unit was not within the relevant distance (one mile) of such of the specified landmarks as appear on the Geological Survey's map of the area, but note (apparently with implied significance) that the map does not show all the landmarks (Br. 10, n. 6). In view of respondents' reticence to acknowledge indisputable geographic facts and the inconvenience of otherwise attempting to prove the relationship of each landmark to the Swanson River Unit, we ask the Court to take judicial notice that an area 25 miles long and 4 miles wide could not all be within "one mile" of anything.

1. We need not pause to answer respondents' unsupported assertion that the Swanson River Unit was somehow "treated" as something it indisputably was not. For even more preposterous is the legal premise of the argument: that the parts of the Kenai Moose Range that were expressly named in the 1955 regulation were so named for the purpose of specifically authorizing their leasing and thereby excepting them from the general prohibition against leasing allegedly contained in Executive Order 8979. What we will show is that the regulation treated the entire Range as available for leasing and then named certain specific areas within it in which, because leasing "might seriously impair or destroy" conservation uses, leasing would *not* be permitted except under special conditions. In short, the areas specifically named were named for the purpose, not of authorizing their leasing, but of imposing additional restrictions upon their leasing. And if the regulation authorized leasing in the named parts of the Range (subject to the special restrictions)—as respondents assert it did—a *fortiori* it authorized leasing in the rest of the Range.

The 1955 version of the refuge-leasing regulation is set forth in full at pp. 4a-5a of our opening brief. It is captioned "Leasing of wildlife refuge lands" and, like its predecessor and successor, was applicable not merely to Alaska but generally to all areas subject to the jurisdiction of the Fish and Wildlife Service. (see § 192.9(a)). In an exploded form which sepa-

rates the three categories of lands with which it dealt, subsection (b)(1) provided:

Areas determined to be indispensable for the preservation of rare or endangered species, remnant big-game herds, and irreplaceable examples of unique animal or plant ecology are not available for leasing. Areas in this category at present are included in Appendix A. [Appendix A included no areas within the Moose Range.]

Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation [a description which would include the whole of the Moose Range],

except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes.

Areas in this category are listed in Appendix B. [Appendix B included the following item: "Kenai: The following areas and all lands within one mile of Tustemena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats."]

The parts of the Range which were expressly designated in the 1955 regulation (i.e., listed in Appendix B), then, were designated as "wilderness, recreational, water development, or marsh" areas in which it had been determined that leasing "might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes." Respondents' argument, incredible as it may seem, is that those areas were designated in order specifically to authorize their leasing while leaving the rest of the Range "closed" to leasing—i.e., that the purpose of the 1955 regulation was to authorize leasing in the Range *only* in areas in which "oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes." The Secretary could permit oil wells to be drilled in the middle of marshlands or on the banks of lakes and rivers where fish and wildlife abound, but no drilling was to be permitted in areas of the Range in which there was no danger of seriously impairing wildlife conservation!

In fact, of course, the world is not upside down, and the lakes, rivers, and marshlands of the Kenai Moose Range that were expressly named in the 1955 regulation (Tustemena Lake, etc.) were named for precisely the opposite purpose: to *except* them from the cate-

gory of lands otherwise *open* to leasing (*i.e.*, the rest of the Range) and to *forbid* their leasing unless the Service first approved a detailed operating program which provided adequate safeguards to protect the wildlife in those especially sensitive areas. What the regulation in terms said was that: "Oil and gas leases *may be issued* for other lands administered by the Fish and Wildlife Service for wildlife conservation *except that*," unless special requirements are satisfied, "no leases will be issued" within one mile of Tustumena Lake and other designated areas of the Moose Range (and of other refuges) as to which it had been determined that leasing "might seriously impair or destroy" wildlife conservation purposes. The general provision that "Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation" by its own terms included the whole of the Kenai Moose Range, and the specific exception from that provision of certain designated parts of the Range (the named waters and marshlands) confirmed that meaning by necessary implication. If the Range as a whole was not subject to the general provision, there was no need to except the designated parts of it. And the result of any other reading would be the absurdity contended for by respondents—to wit, that leasing was permissible only in the parts of the Range in which it "might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes."

In sum, the Swanson River Unit leases were issued, not because they were in an area in which leasing

"might seriously impair or destroy" wildlife conservation (or were "treated" as being in such an area), but because the Range as a whole was then, as it always had been and as it was clearly treated by the regulation, fully available for leasing.*

* Even though the Swanson River Unit was not within the areas designated in Appendix B, the applicants for those leases in fact submitted and obtained Service approval of a detailed operating program for the unit, a fact to which respondents seek to attach significance (Br. 10, 42-43). The explanation is two-fold. The designation of areas subject to that requirement was not a closed category; the Fish and Wildlife Service could at any time designate other areas in which leasing "might seriously impair or destroy" conservation purposes and accordingly require advance approval of operating programs as to them. Submitting and obtaining approval of an operating program for *any* area in the Range was thus appropriate to pretermite the question whether the area should be so designated. In addition, as explained in our opening brief, the Secretary had directed his subordinates to withhold final action on lease applications pending a further revision of the regulations (Br. 10-21), and the Swanson River Unit leases were issued only after the House Committee on Merchant Marine and Fisheries expressed its concurrence in the Departmental judgment that issuance of the particular leases would not be detrimental to wildlife uses and need not be further delayed pending final resolution of the question of the leasing policies generally to be followed (Br. 16). To persuade the Department and the Committee that the proposed leasing was consistent not only with the existing regulations but with any that were likely to be adopted, it was obviously appropriate to obtain Fish and Wildlife Service approval of the proposed operations whether or not the existing regulations required it.

Needless to say, the requirement of the 1955 regulation that a detailed operating program be submitted within six months—of which respondents also make much (Br. 43)—was applicable only to areas that had in fact been designated as areas in which leasing "might seriously impair or destroy" wildlife values (i.e., Appendix B areas), not to those that had not been so designated but in the future might be.

2. In support of their reading of the 1955 regulation as authorizing leasing only in those areas of the Range in which it might "seriously impair or destroy" wildlife conservation (i.e., the Appendix B areas), respondents make the further assertion that prior to 1958, except for the requirements applicable to the Appendix B areas, "there was no other program for protection of the wildlife for the withdrawn area of the Moose Range" (Br. 44) and "there were absolutely no safeguards or other procedures to protect the national breeding and feeding range of the giant Kenai moose" (Br. 47; see also 37). Once again it requires but a reading of the regulation, which respondents fail even to mention, to expose the statement as patently false.

Having provided that "Oil and gas leases may be issued" in wildlife refuges other than in the areas specifically excepted, the 1955 regulation immediately went on to provide that any prospecting under such leases must "be of a type and at a time satisfactory to the Fish and Wildlife Service"; that no drilling may be conducted "until such lease has been committed to an approved unit plan"; that no drilling operations under the unit plan may be conducted "without the consent and approval of the Fish and Wildlife Service as to the time, place, and nature of such operations"; that no plan of development including refuge lands may "be approved without the concurrence of the Fish and Wildlife Service"; and that the lessee must "observe and comply with all State and Federal laws and regulations relating to wildlife" (§ 192.9(b)(2), Pet. Br. 4a-5a). The Fish

and Wildlife Service thus retained virtually plenary control over the development of any leases issued in wildlife refuges. The Service's powers were, indeed, just as great as they were over operations conducted in the Appendix B areas. The only difference was that, in Appendix B areas, the Service had to be satisfied in advance of the feasibility of development while affording full protection to the wildlife before any lease at all could be issued; in the other less sensitive areas where at least some development was clearly feasible, the leases could be issued without prior approval of the proposed operations but the lessee had then to obtain the Service's approval of the details of any actual prospecting or drilling. In what way the 1958 regulation did—or, indeed, could—provide any greater measure of protection for the wildlife, respondents do not say.

3. Respondents' final argument about the 1955 regulation is that, even if it did treat the entire Moose Range as open to leasing—as we have shown it clearly did—that proves nothing about the prior status of the lands, the regulation would simply have "opened" the lands prospectively, and the applications of the Grif-

Respondents are equally wrong in their implied assertion that the original 1947 version of the regulation provided no procedures for protection of the wildlife (Br. 37). That regulation required the lands to be "subjected to an approved cooperative or unit plan" even before the lease was issued and further prohibited any "drilling or prospecting" under the lease "except when consented to by the Secretary of the Interior upon the advice of the Fish and Wildlife Service" (§ 192.9, Pet. Br. 3a).

fin group, having been filed (in October 1954–January 1955) prior to the adoption of the 1955 regulation (December 8, 1955), would still have been invalid (Br. 41–42, 43–44). Our answer to that argument is twofold.

First, that would still not remove the independent significance of the issuance of the Swanson River Unit leases, for the *applications* for those leases were likewise filed (in October–November 1954) prior to the 1955 regulation and, in fact, during exactly the same period that the Griffin applications were filed. Those leases were issued after public congressional hearings and with the prior approval of a congressional committee (see Pet. Br. 16), and their issuance made notorious—if it was not already notorious—the Secretary's long-standing construction of Executive Order 8979 as not barring mineral leasing. If the Swanson River Unit applications were valid, so too were the Griffin applications filed at the same time.

Second, we submit that the 1955 regulation was premised upon the Secretary's *construction* of Executive Order 8979 as leaving the area open to leasing and was not intended as a *modification* of that order, "opening" the lands to leasing for the first time. If so, the regulation, as an official and formal confirmation of that construction, does have very great weight indeed in establishing the *prior* status of the lands.

It is true, as pointed out in our opening brief (pp. 25–26), that the Secretary had authority, if necessary, actually to amend the Executive Order and to

modify the terms of the withdrawal. That the Secretary did not *think* he was doing that in the 1955 regulation is evident, however, from two circumstances. In the first place, the President's delegation to the Secretary of the power to make or modify withdrawals had in terms said the Secretary might do so "by public land orders."¹ Whether or not a "regulation" could, if necessary to its validity, be given effect as an exercise of that power even though not styled a "public land order," any *intentional* exercise of that power has always been done by formal "Public Land Orders"—as is demonstrated, indeed, by the large number of such orders collected in the appendices of respondents and *amici*.²

¹ Executive Order 10355 (17 F.R. 4831); See R. 102

² That observation is equally responsive to respondents' argument that the 1958 regulation and implementing order were intended to "open" the Range for the first time—rather than being merely confirmatory of the Secretary's longstanding view that Executive Order 8979 had never closed the Range to leasing in the first place. Respondents' statement that the 1958 regulation was "express" in applying to all wildlife refuges "whether they had been previously closed or open to" leasing (Br. 44) and "expressly indicated" that it was to cover "even those [refuges] which by the terms of the order creating them were closed to oil and gas leasing" (Br. 42; 8) is another of respondents' many misstatements. The only support given for the statement (Br. 44) is a reference to "*(supra*, p. 12)." The portion of the 1958 regulation quoted at p. 12 of respondents' brief, in turn, is quoted accurately but says only that "no leases * * * will be issued" in certain refuges "even though such lands * * *, by the terms of the withdrawal order, *may be subject to mineral leasing*." That the 1958 regulation "*expressly forbade* leasing in some refuges that had previously been *open* to leasing is admitted. But what respondents say is that it was equally "express" in *authorizing* leasing in refuges

In the second place, it seems evident that, if the Secretary thought he was changing the status of the Kenai Moose Range (rather than merely imposing additional restrictions on leasing in it), he would have done so in much more express terms than those found in the 1955 regulation. As noted above, the regulation never expressly referred to the Range as a whole; the only reference by name was to certain parts of the Range (Tustumena Lake, *etc.*) which were named for the purpose of *excepting* them from the general provision that "Oil and gas leases may be issued" in wildlife refuges. As we have shown, the specific exception of parts of the Range, in order to subject their leasing to special restrictions, necessarily *assumed* that the Range as a whole was open to leasing—*i.e.*, under the terms of Executive Order 8979—since otherwise the regulation is an absurdity. But such an indirect implication—however inescapable and however clearly it confirms the availability of the Range for leasing—is plainly inappropriate as a technique affirmatively to *change* the status of the Range.

that had been *closed* to leasing by the terms of the withdrawal order, and that is simply not so. The Secretary has always asserted the power to "regulate"—even to the extent of forbidding altogether—leasing in areas left open by the withdrawal order, and it is that power that he exercises by regulation. But to permit leasing in an area closed by the withdrawal order plainly requires a modification of the withdrawal order itself, and that power has always been exercised, not by regulations, but by "Public Land Orders," as the Executive Order delegating that authority to the Secretary contemplated that it would be.

In short, if the Secretary had thought he was changing the status of the Range and actually modifying Executive Order 8979, he (a) would have done so expressly and not by indirection and (b) would have done so by a Public Land Order and not by a regulation. That the 1955 regulation does clearly *treat* the Range as open to leasing is thus proof of the Secretary's construction of Executive Order 8979 as permitting mineral leasing, thereby evidencing the status of the lands at the time the Griffin applications were filed as well as prospectively.¹⁰

¹⁰ In support of their claim that the 1955 regulation "is worthless as an indication of the pre-existing status of any lands" (Br. 42), respondents have found *one* refuge out of the 176 listed in Appendix B of the regulation which they claim "had prior thereto clearly been closed to leasing" (Br. 41; 9, n. 4). We may pass the question whether one mistake in a listing of 176 refuges would prove much in any event, for the fact is that it is the respondents who err. The refuge referred to is the Salt Plains in Oklahoma, a small part of which (543 acres in a reservation covering over 30,000 acres) was withdrawn by Public Land Order 144, 8 F.R. 9430 (Br. 41, n. 48). It is true that the first paragraph of that order did expressly withdraw the lands "from all forms of appropriation under the public land laws, including the mining laws and the mineral-leasing laws." What respondents neglect to tell the Court is that the *third* paragraph of that order then went on to provide:

"In the administration of these lands as a part of the Salt Plains National Wildlife Refuge, the Department of the Interior shall have the authority to utilize and dispose of the economic resources of the land in accordance with the laws and regulations governing national wildlife refuges * * *." The Mineral Leasing Act of 1920 is by its own terms fully applicable to wildlife refuges (see § 1, Pet. Br. 1a), and § 192.9 of the regulations is itself one of the general regulations gov-

B. OTHER LEASING ACTIONS

1. Respondents' repeated statement that "all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order, or were in the Swanson River Unit" (Br. 11-12, 44) is erroneous. As we pointed out in reply to the same statement in the brief in opposition, there were in fact six leases issued prior to 1958 in the area withdrawn by Executive Order 8979 which were not within the Swanson River Unit (items 1-6, Sch. I(A)).¹¹ We have now been advised by the Manager of the Anchorage land office, however, that those six leases

erning the utilization and disposal of the "economic resources of the land" in wildlife refuges.

Finally, even if that small part of the Salt Plains had indeed been expressly closed to leasing by the withdrawal order, we would not read a simple listing of the "Salt Plains" in Appendix B of the 1955 regulation as having been intended to modify the terms of the withdrawal. A general listing of the "Salt Plains" (large parts of which were admittedly open to leasing) as one of the areas in which leasing "might seriously impair or destroy" wildlife conservation purposes and in which, therefore, special restrictions should be imposed on leasing (§ 192.9(b)(1), Pet. Br. 4a) carries no implication, we submit, that any part of the area so designated that was previously entirely closed to leasing should henceforth be open. The purpose of the Appendix B designation of an area was to restrict, not to enlarge, its leasing.

¹¹ In pointing out the error, we noted that respondents may have been misled by the map filed by the amici in the court of appeals (though the map does show one of the leases (in T4N-R10W)) (Reply to Br. in Opp. 5 n. 3). Instead of acknowledging the error, respondents now repeat the misstatement, each time carefully prefacing it with, "Based on this map" (Br. 11-12), or "As the map * * * shows" (Br. 44).

were apparently issued by mistake.¹³ We accordingly place no reliance on them.

2. With the minor exception noted, respondents' statement that all the pre-1958 leases other than those in the Swanson River Unit were in the area excepted from the 1941 Executive Order is true enough. And as to nine of the respondents, that statement is sufficient to dispose of the direct relevance of the other pre-1958 leases. Yet it does not dispose of them as to respondent Coyle, for his application—and the leases in conflict with it—were likewise on lands within the excepted area.

Most of the area originally excepted from Executive Order 8979 was later withdrawn from settlement by Public Land Order 487, and prior to 1958 a total of 23 leases covering 42,477 acres were issued in the area so withdrawn on applications filed (like those of the Griffin group) *before* Public Land Order 487 was revoked in 1955 (Sch. II(A) and items 1-21 of Sch. II(B)). Those leases show a consistent practice directly contrary to respondent Coyle's construction of Public Land Order 487, upon which his claim wholly depends. While respondents correctly deny their relevance to the construction of Executive Order 8979,

¹³ In the covering letter forwarding his affidavit to us (printed in the appendix, *infra*, pp. 1a-2a), the Manager states that those six leases did not comply with the requirements of the refuge-leasing regulation then in force (the 1947 version, Pet. Br. 3a) and seem to have been issued in the mistaken belief that the lands were "outside the boundary" of the withdrawn area, the mistake being attributable to the "ambiguous nature of the boundary line on the old maps used during that period."

they fail ever to return and consider their relevance to the construction of Public Land Order 487. Nor, of course, is respondents' distinction of those leases in any way responsive to our opening brief, since we there carefully separated the leases issued in the areas subject to the two different withdrawal orders.

3. There is another, and still more important, respect in which respondents' treatment of the leasing actions in the Range is incomplete. The leasing actions we relied upon to establish the consistent administrative practice were not limited to leases actually issued prior to 1958. An equally important fact was that throughout the period involved the Department did not reject any of the hundreds of applications filed on the relevant areas (as it would have done if it had considered the areas to be "closed") but to the contrary it accepted the applications for filing, initially processed them, and then withheld final action on them pending resolution of the question whether, and to what extent, new regulations should be adopted limiting leasing in the Range (see Pet. Br. 12, 19-21). When the new regulations were issued in 1958, the previously-filed applications (covering almost the entire Range) were promptly acted upon, and 294 leases covering 621,234 acres were issued in the area withdrawn by Executive Order 8979 (Sch. I(B)). An additional 51 leases covering 74,401 acres were also issued at that time in the area withdrawn by Public Land Order 487 (on applications filed prior to September 9, 1955, the date that order was revoked) (items 22-72 of Sch. II(B)). Despite

the overwhelming demonstration of the consistent administrative practice which that action affords, it is wholly ignored by respondents.

4. At page 12, note 8, of their brief, respondents take note of our argument that the absence of general leasing in the Range prior to 1958 was attributable only to the fact that final action on the pending applications had been suspended pending new regulations (see Pet. Br. 19-21) and not to a belief that Executive Order 8979 had "closed" the area to leasing. Respondents then state that: "It is curious, however, that the Department issued leases in the excepted portion of the Range prior to 1958 by making individual waivers of the suspension orders, but never followed a similar procedure with respect to the withdrawn area of the Range." What is curious, we suggest, is respondents' ability to ignore even facts which they themselves acknowledge elsewhere in their brief—in this instance, the committee-approved "waiver" of the suspension in order to permit the 1956 leasing of the Swanson River Unit, located entirely within "the withdrawn area of the Range" (see Pet. Br. 16, 19-21).

III

THE CASES CITED DO NOT SUPPORT RESPONDENTS' CONSTRUCTION OF "SETTLEMENT, LOCATION, SALE OR ENTRY" AS INCLUDING MINERAL LEASING.

To establish that a withdrawal of lands ^{from} ~~for~~ "settlement, location, sale or entry"—the language common to both Executive Order 8979 and Public Land Order 487—closes the lands to leasing under the Mineral

Leasing Act of 1920, respondents rely upon *Wilbur v. Barton*, 46 F. 2d 217 (C.A.D.C.), affirmed, 283 U.S. 414, and *Bourdieu v. Pacific Oil Co.*, 299 U.S. 65 (Br. 28-30). Neither case supports the conclusion.

1. To place *Wilbur v. Barton* in context requires a word of history. Until the 1920 Act, oil and gas rights in the public lands were acquired in the same way as other minerals—*i.e.*, by placer mining locations. Anyone was free to go upon the public lands, stake out a location, and prospect for oil or other minerals. Upon making a “discovery,” he became entitled as of right to a patent to the land as well as the minerals. In 1909, because of a fear that oil reserves were being too rapidly depleted by extensive exploitation taking place primarily in California, the President issued a Proclamation providing that:

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in [a defined area of over 3 million acres in California and Wyoming] * * * are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. * * * [236 U.S. at 467.]

The power of the President to make the withdrawal was challenged and was ultimately upheld by this Court in 1915 in *United States v. Midwest Oil Co.*, 236 U.S. 459, primarily on the grounds of the lack of any vested private rights (*i.e.*, prior to location), the general power of the Executive to manage the public domain, and the long-continued practice of making

such withdrawals. In the meantime, however, Congress passed the so-called "Pickett Act" of June 25, 1910 (36 Stat. 847, 43 U.S.C. 141-142), to remove any doubts about the matter for the future. That Act provided that:

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry, any of the public land * * * and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawal * * *.

It is to be noted (1) that the legislation was precipitated by an order promulgated by the President specifically for the purpose of preventing the private acquisition of rights to petroleum deposits in the public domain and (2) that the methods of acquisition enumerated in the Act were fully appropriate to include the means by which such rights were acquired at that time (by "location").

The Mineral Leasing Act of 1920 changed the method by which oil and gas rights in public lands could be acquired. No longer could rights to both the minerals and land be acquired by autonomous private action (*i.e.*, locations). Instead, the Secretary was empowered to issue prospecting permits and then required, if a discovery were made under the permit, to issue a lease which entitled the lessee to extract the discovered mineral from the land but gave him no right to the land itself.¹³ In 1929, because

¹³ In 1935, the prospecting permit procedure was eliminated and the present direct leasing procedure substituted. Act of August 21, 1935, 49 Stat. 676.

of an overproduction of oil, the Secretary of Interior issued a nationwide order directing the land offices to reject all pending permit applications and not to receive any further applications. It was that order that was challenged in *Wilbur v. Barton*. The court of appeals upheld the order on alternative grounds: (1) that it was authorized by the Pickett Act; and (2) that the Leasing Act in any event merely "authorized" and did not require the issuance of permits. 46 F. 2d 217. This Court, as respondents note (Br. 30), affirmed the decision. As they fail to note, however, it did so, not on the Pickett Act ground, but on the ground that the Leasing Act itself was permissive rather than mandatory (more precisely, that the Secretary's construction of it as being permissive was "plausible" and hence controlling). 283 U.S. 414.

Even though this Court did not endorse it, however, we note that the court of appeals' holding that authority for the order could, if necessary, be found in the Pickett Act seems to us entirely defensible. To be sure, the language of the Act did not readily include leasing, but the Act had plainly been intended to authorize withdrawals of petroleum deposits from private development (the occasion, indeed, for its enactment), and the subsequent change in the method of acquisition of oil and gas rights (from "location" to "leasing") afforded no reason to suppose that Congress meant to terminate that basic power. As the court of appeals said, "the act of 1910 was intended to be of wide scope" (46 F. 2d at 220); a niggardly interpretation of it, which failed to take account of

the intervening change in the form of grant of mineral rights, would plainly have been inappropriate.

We accordingly do not dispute the proposition that the Pickett Act, having been intended to authorize withdrawals of petroleum deposits from private development (and using language appropriate to the form of acquisition in use at the time), continued to authorize such withdrawals even after a change in the form of acquisition left its language literally inappropriate, for that is hardly a unique feat of statutory construction. But that in no way proves the proposition for which the case is cited by respondents: that the words "settlement, location, sale or entry" *per se* include mineral leasing, even when used in an order issued *after* the adoption of the Mineral Leasing Act and thus at a time when oil and gas rights were no longer acquired by "location." "A word is not a crystal, transparent and unchanged: it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425. If the Leasing Act had been in force in 1910, the circumstances would have been different and Congress itself would plainly have used different words to describe the acquisition of mineral rights, for the simple and indisputable fact is that an application for a lease is *not* a "location." And unlike the Pickett Act, the orders involved in this case *were* issued after the Mineral Leasing Act was in effect and therefore at a time when "location" was not an apt word to include the acquisition of oil and gas rights. Had the Secretary

meant to include the latter, he would have used the words appropriate to the task at the time of his order—to wit, “mineral leasing”—as he in fact does when he wishes his order to have that effect (see pp. 31-32, *infra*). He plainly would not have relied, unnecessarily and foolishly, upon the process of interpretation that it was necessary to go through to adapt the outmoded language of the Pickett Act (as applied to the acquisition of oil and gas rights) to changed conditions. The point is not that Congress and the Secretary used the words differently—“location” means the same thing today that it did in 1910—but that the acquisition of oil and gas rights has since been taken out of the categories defined by those words.

2. Respondents state that in *Bourdieu v. Pacific Oil Co.*, 299 U.S. 65, the Court “construed an Executive Order containing language virtually identical to that in Public Land Order No. 487 to close the land to mineral leasing” (Br. 30). Neither the issue nor the language was the same. A 1910 Executive Order had provided that certain lands “are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting *the use and disposal of petroleum lands.*” A 1914 statute provided that lands “withdrawn or classified” as, *inter alia*, “oil” lands could be entered upon with a view to obtaining a patent “with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified.” In 1919, the plaintiff made an entry, specifically pursuant to the 1914 stat-

ute, on lands subject to the 1910 Executive Order. If the lands were "not withdrawn or classified as mineral at the time of entry," he was entitled to a preference under § 20 of the Mineral Leasing Act of 1920 (41 Stat. 437, 445) in the issuance of any prospecting permit or lease under that Act. The Court held that the land had been "withdrawn * * * as mineral" by the 1910 Executive Order, so that the plaintiff was not entitled to a preference. Not only was the language of that Executive Order significantly different from Public Land Order 487 (in its specific reference to "petroleum" as the occasion for the withdrawal), but the Court did *not* hold that the lands were "closed" to leasing under the Mineral Leasing Act. In fact, the lands *had* been leased under that Act, and the only question was whether the surface entryman had a preferential right to the lease, which the Court held he did not.

IV

MISCELLANEOUS

1. At page 23-24, note 19, respondent quote § 71.1 of the regulations as though it were in Part 51, entitled "Public Land Laws Applicable to Alaska." As its number suggests, § 71.1 is actually in Part 71, entitled "Mineral Lands; Oil and Gas * * * Permits and Leases."¹⁴ The same misrepresentation made to the court of appeals found its way into the court's opinion (see R. 88). The matter does not seem to us of much significance, but it does to respondents and is symptomatic of their use of materials.

¹⁴ See 43 C.F.R., Part 71 (1938, 1949 and 1954 editions).

2. For our reply to the substance of respondents' arguments over the particular wording of the withdrawal provision of Executive Order 8979 (Br. 22-28)—*e.g.*, the significance of the reference to "fish trap sites", the meaning of "public land laws applicable to Alaska", the significance of the express provision making the lands not subject to "lease" under the cited fur-farming and grazing statutes—we rely generally on the Richfield-Standard *amicus* brief, which develops those points (at pp. 19-29) much more extensively than did our opening brief. An additional word may be warranted, however, in response to the new significance respondents attach to the proviso that the reservation and use as a part of the Range of the "excepted lands" (*i.e.*, those not withdrawn from settlement by Executive Order 8979) "shall be without interference with the *use and disposition thereof* pursuant to the public land laws applicable to Alaska" (respondents' emphasis). Respondents' argument, as we understand it, is that the use of "use and disposition" in the proviso proves that "disposition" when used alone in the withdrawal provision included "use" (Br. 5, 23). Under all the normal rules of construction, of course, it proves just the opposite: that "use" and "disposition" of land were used to describe different things. We note also that if "public land laws applicable to Alaska" means only laws of general application throughout the United States and excludes laws applicable only to Alaska—which respondents claim it means in the

withdrawal clause (Br. 26-27) "—the anomalous result would be that the "excepted lands" would not, under the proviso, be subject to "use and disposition" under any of the special laws applicable only to Alaska.

3. We admitted in our opening brief (pp. 29-31) that the reference to "mineral leasing" in paragraphs 6 and 7 of Public Land Order 1212—in prescribing the dates upon which the revocation of Public Land Order 487 would become effective—seemed to reflect a premise that Public Land Order 487 had closed the area to leasing. We went on to show, however, that the error was promptly caught and corrected by an amendment deleting the references to "mineral leasing" in those paragraphs. Respondents reply that the implication that the lands were previously closed arises, not from the references to "mineral leasing" in paragraphs 6 and 7, but from the presence of the single word "application" in paragraph 4, which word was not deleted by the amendment (Br. 38-41). The argument is, we submit, frivolous on its face. Respondents are also wrong in saying that the amendment was not made until "about 9 months later" (Br. 30)—in which event, the order would have already gone into effect. Public Land Order 1212 was issued on September 9, 1955 (20 F.R. 6795); the amendment, on October 14, 1955 (20 F.R. 7904), only 35 days later.

¹⁵ Respondents' argument seems to be based on reading "public land laws" to mean "*public laws* dealing with land" rather than, as it obviously does mean, "*laws* dealing with *public* land."

and *before* the order went into effect. Finally, we wish to emphasize that those orders are in any event relevant only to respondent Coyle's case and have no bearing whatever on the main issue in the case—the status of the lands withdrawn by Executive Order 8979.

4. In an argument by innuendo, respondents recite at length in their Statement the facts and regulations relating to the drawing among the offers “simultaneously” filed during the period August 14–24, 1958 (Br. 14–16), and then later state that, in the drawing, they “were selected as the first qualified applicants” only to have their applications rejected (Br. 46). We showed in our opening brief that the sole function of the drawing, as was made plain by the order establishing the simultaneous-filing period, was to determine the priority (and hence order of processing) as among the offers “simultaneously” filed during that period. The drawing had nothing to do with the priority of the 1958 applications vis-a-vis the pre-1958 applications, which the order expressly directed were to be processed first (see Pet. Br. 22–24 and notes).

5. Respondents repeatedly emphasize the words “open” “opened” and “opening” whenever used in the order of August 2, 1958, or in the press release of January 29, 1958, announcing the forthcoming order (Br. 13–14, 45). The usage is readily explicable. Not only had general instructions not to take final action on lease applications in the Range been outstanding ever since 1953, but the new regulations issued on January 8, 1958, had expressly provided

that no new applications "will * * * be accepted for filing" until after a subsequent order was issued "specifying those lands which shall not be subject to oil and gas leasing" (§ 192.9(b)(3), (c), Pet. Br. 7a, 8a). The subsequent order of August 2, 1958, therefore, did "open" the Range to leasing in at least two senses: (1) it terminated the "suspension" of leasing that had been in effect since 1953; and (2) it terminated the prohibition on new filings that had been in effect since January 8, 1958. But as shown in our opening brief, nothing said either in or about the 1958 regulation and its implementing order carries any implication that the lands had been "closed" to leasing by Executive Order 8979; to the contrary, the order of August 2, 1958, expressly assumed that the pending pre-1958 applications had been validly filed and directed their immediate processing (see Pet. Br. 21-24).

6. Throughout their brief, respondents refer to the Griffin group of applicants as "representatives of certain major oil companies" (Br. 2, 7, 15, 37, 38, 43, 46, 47). Nothing in the record supports the statement, and we are advised by *amici* that none of the Griffin group of applicants were acting as "representatives" of the oil companies at the time their applications were filed.¹⁶ In any event, it matters not who the applicants were; the only question is whether the lands were open for leasing at the time the applications were filed.

¹⁶ While we stated in our reply to the brief in opposition (p. 9, n. 9) that the Griffin applicants had "no" relationship to the companies, some of the applicants may have been associated with one or more of the oil companies in other matters.

7. Respondents' list of 146 orders, issued between 1936-1959, expressly permitting mineral leasing (Br. 4, 30-31, 34, 40, 7a-10a) in no way proves that orders silent on the matter bar mineral leasing. The *amici* cite an even greater number, issued over a much shorter period of time (1940-1952), which expressly *forbid* mineral leasing (Marathon-Union Br. 6A-7A). Most of the orders cited by respondents prior to 1944 are explicable by their special circumstances.¹⁷ The explanation of the others seems to be that, at about that time, the Department began to use with regularity a simpler form of withdrawal order which withdrew the lands either "from all forms of appropriation, including the mining *but not* the mineral leasing laws" (Resp. Br. 7a, items 8-21; 8a-10a, items 16-125)¹⁸ or "from all forms of appropriation, including the mining *and* the mineral leasing laws" (Marathon-Union Br. 6A-7A). While such specificity either way is desirable, a mere listing of the two

¹⁷ Most of the withdrawals were for the purpose of creating grazing districts and game ranges (usually combined as a dual purpose). Section 6 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272, 43 U.S.C. 315e), to which the withdrawals were subject, provided that nothing in the Act "shall restrict prospecting, locating, developing, mining, entering, leasing or patenting the natural resources of" the land; it is not surprising that many of the withdrawals track the language of that statute (Resp. Br. 4 n. 1; 7a, items 1, 2, 5, 6; 8a, items 1-14). In others, the lands were known to be in an oil and gas field or to be valuable for oil and gas, and it was appropriate to make special provisions for their development (Br. 7a, items 3, 4, 7).

¹⁸ That is the form of the small withdrawal made in paragraph 2 of Public Land Order 1212, upon which respondents place great weight (Br. 38-40). While Public Land Order 487 was still outstanding, however, several other parts of it

classes of orders proves little about what is meant by an order that does not mention mineral leasing. And, as shown in our opening brief, the Department's practice has always been to construe orders as not forbidding the use of the land for mineral development unless they specifically so provide."

were withdrawn, by other orders, "from all forms of appropriation under the public-land laws, including the mining and the mineral-leasing laws" (Public Land Order 751, Sept. 6, 1951, 16 F.R. 9044; Public Land Order 778, Jan. 5, 1952, 17 F.R. 159), a fact which has exactly the contrary implications (if any are indeed to be drawn).

²⁰ To support a contrary claim, respondents cite *Mary E. Brown*, 62 I.D. 107; *Devereil W. Dimond*, 62 I.D. 260; and *G. E. Kadane & Sons*, 65 I.D. 446 (Br. 33, nn. 32 and 34). As is clear from the opinions, those cases all involved withdrawals of land for Indian purposes, in which case they are not treated as "public" lands and are governed by different considerations. See 34 Op. A. G. 171.

Respondents also cite *D. Miller*, 60 I.D. 161 (Br. 34 and n. 36). The decision is not in point. The lands involved had not only been withdrawn from "settlement, location, sale or entry" (the words quoted by respondents) but had been reserved for the "exclusive use" of the Navy Department. At the time Miller's application to lease was filed (in 1944), § 1 of the Mineral Leasing Act expressly excluded from the Act any "lands withdrawn or reserved for military or naval uses or purposes" (41 Stat. 437). For that reason it was obvious that the lands were not then available for leasing, and Miller did not even argue the contrary. Subsequently, however, the exclusion of military reservations was deleted from the Leasing Act (by the Act of August 8, 1946, 60 Stat. 950). What the *Miller* decision was about, and all it was about, was whether Miller's application should be rejected because it was filed when the lands were not available for leasing (as the Solicitor held) or was validated upon the lands later becoming available for leasing. The subsequent decision in *Noel Teuscher*, 62 I.D. 210—which respondents cite as "overruling" *Miller*—merely held that after the 1946 amendment to the Act the lands were of course available for leasing, thus confirming, in accordance with the Department's consistent prac-

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

ROGER P. MARQUIS,
EDMUND CLARK,
Attorneys.

OCTOBER 1964.

tice, that the language of the *withdrawal order* ("settlement, location, sale or entry") did not itself prevent leasing.



APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Anchorage District & Land Office
555 Cordova Street
Anchorage, Alaska 99501

In reply refer to: DM 3120

OCTOBER 9, 1964.

MR. WAYNE G. BARNETT
Assistant to Solicitor General
Department of Justice
Washington, D.C.

DEAR MR. BARNETT:

On page twelve of petitioner's brief you mention leases issued as early as 1953, to substantiate the argument that the Department has always considered the Kenai National Moose Range open to leasing. The fact that we have leases, other than those within the Swanson River Unit, (approved July 31, 1956) issued inside the Range¹ prior to 1958, is due to the ambiguous nature of the boundary line on the old maps used during that period of time. According to regulation 43 CFR 192.9 then in effect, the only leases which could issue were those within approved unit plans or those which contained a provision to prohibit drilling on refuge lands except when consented to by the Secretary.

Other than the Swanson River leases, identified on Schedule 1(a) as number 7-37 inclusive, the leases shown to be issued within the Range¹ prior to 1958

¹ Main body of Kenai National Moose Range not open to settlement.

were issued in error as they meet neither provision of the cited regulation and were issued only because it was thought at the time that they were outside the boundary. I mention this particularly since Mr. Tallman has checked these leases quite carefully and questioned the cause of their issuance.

All of the information reflected on the attached schedule can be obtained from the plat books except the application date of the offers. We have therefore added a second column to reflect the serial book in which the narrative of the status of the case record is reflected which includes offer date.

Even though decimal figures are shown, unsurveyed areas included in the total acreage are close approximations.

Sincerely yours,

James W. Scott,

JAMES W. SCOTT,

Manager, Anchorage District and Land Office.

Attachments: Schedule I, II and III.

In reply refer to:

Affidavit

STATE OF ALASKA,

Third Judicial District, ss:

James W. Scott, being first duly sworn, on oath deposes and says:

1. That he is the Manager of the Land Office, Bureau of Land Management, Department of the Interior, Anchorage, Alaska.

2. That in his capacity as Manager, he is custodian of the official records of said Land Office, pursuant to authority vested in the Secretary of the Interior (43 U.S.C. sec. 12) and delegated to Land Office Managers by Departmental Manual 235.1.1 and Bureau Order No. 701, sec. 2.2.

3. That the information set forth in Schedule I, II, and III attached hereto, accurately reflects the information contained in the official records maintained in this Land Office, which records are available for inspection by the public during regular business hours. 43 CFR 2.1 (revised Jan. 1, 1964).

James W. Scott,
JAMES W. SCOTT,

Manager, Anchorage District and Land Office.

Subscribed and sworn to before me this 9th day of October, 1964. Mae M. Femmer, Notary Public in and for Alaska. My commission expires: Oct. 4, 1965.

SCHEDULE I

OIL AND GAS LEASES ISSUED IN THE AREA WITHIN KENAI NATIONAL MOOSE RANGE WHICH WAS WITHDRAWN FROM SETTLEMENT BY EXECUTIVE ORDER 8979 (DECEMBER 6, 1941, 6 F.R. 6471)

A. Leases issued prior to January 8, 1958

Serial No.	Application date	Lease date	Acreage	Township and range	Plat book No.	Serial book No.
1. 024159 ¹	5/21/1953	10/1/1953	15.00	1 S., 11 W.	B-62	58
2. 020762 ^{1 2}	5/21/1954	9/1/1954	650.00	2 S., 10 W.	B-62	69
3. 026745 ^{1 2}	5/21/1954	11/1/1954	300.00	1 S., 10 W.	B-62	68
4. 026766 ¹	5/21/1954	11/1/1954	80.00	3 S., 10 W.	B-62	60
5. 029304 ^{1 2}	3/1/1955	4/1/1955	2,160.00	2 S., 9 & 10 W.	B-62	79
6. 028060 ^{1 2}	10/15/1954	11/1/1955	561.19	4 N., 10 W.	B-20	74
7. 028076	10/15/1954	9/1/1956	480.00	8 N., 9 W.	B-19	74
8. 028077	10/15/1954	9/1/1956	2,400.00	8 N., 9 W.	B-19	74
9. 028116	10/15/1954	9/1/1956	480.00	8 N., 10 W.	B-20	74
10. 028384	11/29/1954	9/1/1956	2,560.00	8 N., 9 W.	B-19	75
11. 028395	11/29/1954	9/1/1956	2,560.00	10 N., 7 W.	B-17	75
12. 028396	11/29/1954	9/1/1956	2,560.00	7 & 8 N., 9 W.	B-17	75
13. 028397	11/29/1954	9/1/1956	2,560.00	9 N., 8 W.	B-18	75
14. 028398	11/29/1954	9/1/1956	2,560.00	9 & 10 N., 8 W.	B-19	75
15. 028399	11/29/1954	9/1/1956	1,760.00	8 N., 9 W.	B-20	75
16. 028400	11/29/1954	9/1/1956	2,560.00	8 N., 8 & 9 W.	B-18, B-19	75
17. 028401	11/29/1954	9/1/1956	2,560.00	9 N., 8 W.	B-18	75
18. 028402	11/29/1954	9/1/1956	2,560.00	8 N., 8 W.	B-18	75
19. 028403	11/29/1954	9/1/1956	2,560.00	8 N., 8 & 9 W.	B-18, B-19	75
20. 028404	11/29/1954	9/1/1956	2,560.00	9 N., 9 W.	B-18, B-19	75
21. 028405	11/29/1954	9/1/1956	2,560.00	8 N., 9 W.	B-19	75
22. 028406	11/29/1954	9/1/1956	2,400.00	8 N., 9 W.	B-19	75
23. 028407	11/29/1954	9/1/1956	2,560.00	9 N., 8 & 9 W.	B-18, B-19	75
24. 028408	11/29/1954	9/1/1956	2,560.00	9 N., 8 W.	B-18	75
25. 028409	11/29/1954	9/1/1956	1,120.00	7 N., 10 W.	B-20	75
26. 028410	11/29/1954	9/1/1956	2,560.00	9 N., 8 W.	B-18	75
27. 028411	11/29/1954	9/1/1956	2,560.00	9 N., 8 W.	B-18	75
28. 028412	11/29/1954	9/1/1956	2,560.00	9 N., 7 & 8 W.	B-17, B-18	75
29. 028413	11/29/1954	9/1/1956	2,560.00	9 N., 7 W.	B-17	75
30. 028414	11/29/1954	9/1/1956	2,560.00	10 N., 7 & 8 W.	B-17, B-18	75
31. 028415	11/29/1954	9/1/1956	2,560.00	9 N., 7 & 8 W.	B-17, B-18	75
32. 028416	11/29/1954	9/1/1956	2,560.00	9 N., 7 W.	B-17	75
33. 028417	11/29/1954	9/1/1956	2,560.00	10 N., 7 W.	B-17	75
34. 028418	11/29/1954	9/1/1956	2,560.00	10 N., 7 W.	B-17	75
35. 028419	11/29/1954	9/1/1956	2,560.00	10 N., 7 W.	B-17	75
36. 028131 ¹	10/15/1964*	1/1/1957	1,760.00	8 N., 10 W.	B-20	74
37. 028132 ¹	10/15/1964*	1/1/1957	2,400.00	8 N., 9 W.	B-19	74
Total acreage leased.			75,446.19			

¹ Lease later subdivided into two or more leases.

² Lease covers additional acreage not within the described area.

³ Lease later modified to reduce the area leased. The acreage given is of the area originally leased.

* So in original. Should be "1954."

SCHEDULE I

**OIL AND GAS LEASES ISSUED IN THE AREA WITHIN KENAI
NATIONAL MOOSE RANGE WHICH WAS WITHDRAWN FROM SET-
TLEMENT BY EXECUTIVE ORDER 8979 (DECEMBER 6, 1941, 6 F.R.
• 6471)—Continued**

*B. Leases issued after August 14, 1958 on applications filed prior to
January 8, 1958*

[NOTE: Leases in conflict with respondents' applications are printed in boldface]

Serial No.	Applica- tion Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
1. 028571	12/20/1964	9/1/1968	2,560.00	10 N., 8 W.,	B-18	76
2. 028572	12/20/1964	9/1/1968	2,250.13	10 N., 8 W.,	B-18	76
3. 028570	12/20/1964	9/1/1968	1,235.95	10 N., 7 & 8 W.,	B-17, B-18	76
4. 028569	12/20/1964	9/1/1968	2,560.00	10 N., 7 & 8 W.,	B-17, B-18	76
5. 028566	12/20/1964	9/1/1968	2,293.19	10 N., 7 W.,	B-17	76
6. 028567	12/20/1964	9/1/1968	2,560.00	10 N., 7 W.,	B-17	76
7. 028582	12/21/1964	9/1/1968	2,560.00	10 N., 6 & 7 W.,	B-17	76
8. 028562	12/20/1964	9/1/1968	2,560.00	10 N., 6 & 7 W.,	B-16, B-17	76
9. 029147	2/15/1955	9/1/1968	1,280.00	10 N., 6 & 7 W.,	B-17	78
10. 028568	12/20/1964	9/1/1968	2,351.91	9 N., 9 W.,	B-19	76
11. 028560	12/20/1964	9/1/1968	2,550.28	9 N., 8 & 9 W.,	B-18, B-19	76
12. 028564	12/20/1964	9/1/1968	1,760.00	9 N., 9 W.,	B-19	76
13. 028561	12/20/1964	9/1/1968	1,948.06	9 N., 9 W.,	B-19	76
14. 028563	12/20/1964	9/1/1968	2,240.00	9 N., 9 W.,	B-19	76
15. 028565	12/20/1964	9/1/1968	2,560.00	9 & 10 N., 8 W.,	B-18	76
16. 029154	2/15/1955	9/1/1968	1,600.00	9 N., 7 & 8 W.,	B-17, B-18	78
17. 029149	2/15/1955	9/1/1968	2,400.00	9 N., 7 W.,	B-17	78
18. 029150	2/15/1955	9/1/1968	2,560.00	9 N., 7 W.,	B-17	78
19. 029151	2/15/1955	9/1/1968	2,560.00	9 N., 7 W.,	B-17	78
20. 029152	2/15/1955	9/1/1968	2,560.00	9 N., 7 W.,	B-17	78
21. 029153	2/15/1955	9/1/1968	2,560.00	9 N., 7 W.,	B-17	78
22. 029146	2/15/1955	9/1/1968	1,600.00	9 N., 7 W.,	B-17	78
23. 028633	12/22/1964	9/1/1968	2,560.00	9 & 10 N., 6 & 7 W.,	B-16, B-17	76
24. 029148	2/15/1955	9/1/1968	2,560.00	9 N., 8 W.,	B-16	78
25. 028115	10/15/1964	9/1/1968	1,290.00	8 N., 10 W.,	B-20	74
26. 028990	1/28/1955	9/1/1968	2,400.00	8 N., 9 W.,	B-19	77
27. 032907	10/15/1964	9/1/1968	2,080.00	8 N., 9 W.,	B-19	93
28. 032908	10/15/1964	9/1/1968	160.00	8 N., 9 W.,	B-19	93
29. 028987	1/28/1955	9/1/1968	960.00	8 N., 8 W.,	B-18	77
30. 029171	2/15/1955	9/1/1968	2,560.00	8 N., 8 W.,	B-18	78
31. 029173	2/15/1955	9/1/1968	2,560.00	8 N., 8 W.,	B-18	78
32. 029170	2/15/1955	9/1/1968	2,560.00	8 N., 8 W.,	B-18	78
33. 029172	2/15/1955	9/1/1968	2,560.00	8 N., 8 W.,	B-18	78
34. 029164	2/15/1955	9/1/1968	2,660.00	8 N., 7 W.,	B-17	78
35. 029162	2/15/1955	9/1/1968	2,560.00	8 N., 7 W.,	B-17	78
36. 029163	2/15/1955	9/1/1968	2,560.00	8 N., 7 W.,	B-17	78
37. 029155	2/15/1955	9/1/1968	2,400.00	8 N., 7 & 8 W.,	B-17, B-18	78
38. 029161	2/15/1955	9/1/1968	2,560.00	8 N., 7 W.,	B-17	78
39. 029159	2/15/1955	9/1/1968	2,560.00	8 N., 7 W.,	B-17	78
40. 029160	2/15/1955	9/1/1968	2,560.00	8 N., 7 W.,	B-17	78
41. 029168	2/15/1955	9/1/1968	2,660.00	8 N., 7 W.,	B-17	78
42. 028114	10/15/1964	9/1/1968	1,130.00	6 N., 11 W.,	B-22	74
43. 028989	1/28/1955	9/1/1968	2,560.00	6 N., 10 W.,	B-20	77
44. 028118	10/15/1964	9/1/1968	2,560.00	6 N., 10 W.,	B-20	74
45. 028078	10/15/1964	9/1/1968	2,560.00	6 N., 10 W.,	B-20	74
46. 028079	10/15/1964	9/1/1968	2,530.00	6 N., 10 W.,	B-20	74

See footnotes at end of table p. 10a.

B. Leases issued after August 14, 1958 on applications filed prior to January 8, 1958—Continued

[Note: Leases in conflict with respondents' applications are printed in boldface]

Serial No.	Application Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
47. 028963	1/21/1955	9/1/1958	2,580.00	6 N., 9 & 10 W.,	B-19, B-20	77
48. 028964	10/15/1964	9/1/1958	2,580.00	6 N., 10 W.,	B-20	74
49. 028119	10/15/1964	9/1/1958	2,580.00	6 N., 10 W.,	B-20	74
50. 028943	11/30/1963	9/1/1958	230.00	7 N., 11 W.,	B-22	66
51. 028187	10/22/1964	9/1/1958	1,620.00	7 N., 11 W.,	B-22	74
52. 028186	10/22/1964	9/1/1958	2,140.00	7 N., 11 W.,	B-22	74
53. 028085	10/15/1964	9/1/1958	2,580.00	7 N., 10 W.,	B-20	74
54. 028121	10/15/1964	9/1/1958	1,280.00	7 N., 10 W.,	B-20	74
55. 028084	10/15/1964	9/1/1958	2,580.00	7 N., 10 W.,	B-20	74
56. 028084	1/28/1955	9/1/1958	2,580.00	7 N., 10 W.,	B-20	77
57. 028085	1/28/1955	9/1/1958	2,580.00	7 N., 10 W.,	B-20	77
58. 028083	10/15/1964	9/1/1958	2,580.00	7 N., 10 W.,	B-20	74
59. 028120	10/15/1964	9/1/1958	2,580.00	7 N., 10 W.,	B-20	74
60. 028087	1/28/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	77
61. 028082	1/30/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	77
62. 028085	1/28/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	77
63. 028083	1/28/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	77
64. 028002	1/28/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	78
65. 028086	1/28/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	77
66. 028092	1/28/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	77
67. 028094	1/28/1955	9/1/1958	2,580.00	7 N., 9 W.,	B-19	77
68. 028096	1/28/1955	9/1/1958	1,120.00	7 N., 9 W.,	B-19	77
69. 028099	1/28/1955	9/1/1958	2,580.00	7 & 8 N., 8 W.,	B-18	77
70. 028046	1/28/1955	9/1/1958	2,580.00	7 & 8 N., 8 W.,	B-18	78
71. 028048	1/28/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
72. 028174	2/15/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
73. 028175	2/15/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
74. 028049	1/28/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
75. 028003	1/28/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
76. 028045	1/28/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
77. 028043	1/28/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
78. 028176	2/15/1955	9/1/1958	2,580.00	7 N., 8 W.,	B-18	78
79. 028157	2/15/1955	9/1/1958	2,580.00	7 N., 7 W.,	B-17	78
80. 028103	10/15/1964	9/1/1958	2,486.23	4 N., 10 W.,	B-20	74
81. 028949	10/15/1964	9/1/1958	1,920.00	4 N., 10 W.,	B-20	74
82. 028064	1/ 3/1955	9/1/1958	2,580.00	3 & 4 N., 10 W.,	B-20	76
83. 028065	1/ 7/1955	9/1/1958	2,580.00	4 N., 10 W.,	B-20	76
84. 028051	10/15/1964	9/1/1958	2,580.00	4 N., 9 W.,	B-19	74
85. 028110	10/15/1964	9/1/1958	2,580.00	4 N., 9 W.,	B-19	74
86. 028050	10/15/1964	9/1/1958	2,580.00	4 N., 9 W.,	B-19	74
87. 028712	1/10/1955	9/1/1958	2,580.00	4 N., 9 W.,	B-19	76
88. 028067	1/21/1955	9/1/1958	1,920.00	4 N., 9 W.,	B-19	77
89. 028065	1/14/1955	9/1/1958	2,580.00	4 N., 9 W.,	B-19	77
90. 028083	10/15/1964	9/1/1958	2,545.00	3 N., 11 W.,	B-22	74
91. 028123	10/15/1964	9/1/1958	140.00	3 N., 11 W.,	B-22	74
92. 028094	10/15/1964	9/1/1958	1,300.00	3 N., 11 W.,	B-22	74
93. 028094	12/22/1964	9/1/1958	640.00	3 N., 11 W.,	B-22	76
94. 028081	1/28/1955	9/1/1958	2,580.00	6 N., 9 & 10 W.,	B-19, B-20	78
95. 028081	10/15/1964	9/1/1958	2,580.00	6 N., 9 W.,	B-19	74
96. 028082	10/15/1964	9/1/1958	2,580.00	6 N., 9 W.,	B-19	74
97. 028080	1/28/1955	9/1/1958	2,580.00	6 N., 9 W.,	B-19	78
98. 028088	1/28/1955	9/1/1958	2,580.00	6 N., 9 W.,	B-19	77

See footnotes at end of table, p. 10a.

B. Leases issued after August 14, 1958 on applications filed prior to January 8, 1958—Continued

[NOTE: Leases in conflict with respondents' applications are printed in boldface]

Serial No.	Application Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
90. 028002	1/21/1955	9/1/1958	646.00	6 N., 9 W.,	B-19	77
100. 028004	1/28/1955	9/1/1958	2,580.00	6 N., 9 W.,	B-19	77
101. 028001	1/28/1955	9/1/1958	2,580.00	6 N., 9 W.,	B-19	77
102. 028003	1/28/1955	9/1/1958	2,580.00	6 N., 9 W.,	B-19	77
103. 028044	2/ 3/1955	9/1/1958	2,580.00	6 N., 8 W.,	B-19	78
104. 028040	2/ 3/1955	9/1/1958	2,580.00	6 N., 8 W.,	B-19	78
105. 028006	10/15/1954	9/1/1958	2,580.00	6 N., 8 W.,	B-19	74
106. 028122	10/15/1954	9/1/1958	2,580.00	6 N., 8 W.,	B-19	74
107. 028041	2/ 3/1955	9/1/1958	2,580.00	6 N., 8 W.,	B-19	78
108. 028042	2/ 3/1955	9/1/1958	2,580.00	6 N., 8 W.,	B-19	78
109. 028047	2/ 3/1955	9/1/1958	2,580.00	6 N., 8 W.,	B-19	78
110. 029156	2/15/1955	9/1/1958	1,920.00	7 N., 7 W.,	B-17	78
111. 029180	2/15/1955	9/1/1958	2,580.00	7 N., 7 W.,	B-17	78
112. 028064	10/15/1954	9/1/1958	638.30	4 N., 11 W.,	B-22	74
113. 028117	10/15/1954	9/1/1958	960.00	4 N., 11 W.,	B-22	74
114. 028610	12/22/1954	9/1/1958	1,920.00	1 N., 10 & 11 W.,	B-20, B-22	76
115. 028603	12/22/1954	9/1/1958	2,240.00	1 N., 10 W.,	B-20	76
116. 028601	12/22/1954	9/1/1958	1,920.00	1 N., 10 & 11 W.,	B-20, B-22	76
117. 026766	5/21/1954	9/1/1958	640.00	1 N., 10 W.,	B-20	60
115. 026757	5/21/1954	9/1/1958	1,280.00	1 N., 10 W.,	B-20	60
119. 028668	1/ 3/1955	9/1/1958	640.00	1 N., 10 W.,	B-20	76
120. 028690	12/22/1954	9/1/1958	700.00	1 N., 10 & 11 W.,	B-20, B-22	76
121. 028609	12/22/1954	9/1/1958	2,230.00	1 N., 10 & 11 W.,	B-20, B-22	76
122. 026761	5/21/1954	9/1/1958	760.00	1 S., 10 W.,	B-62	60
123. 026771	5/21/1954	9/1/1958	640.00	1 S., 10 W.,	B-62	60
124. 026772	5/21/1954	9/1/1958	580.00	1 S., 10 W.,	B-62	60
125. 026746	5/21/1954	9/1/1958	1,185.00	1 S., 10 W.,	B-62	60
126. 026745	5/21/1954	9/1/1958	735.00	2 S., 10 W.,	B-62	60
127. 026744	5/21/1954	9/1/1958	2,440.00	2 S., 10 W.,	B-62	60
128. 026750	5/21/1954	9/1/1958	1,420.00	2 S., 10 W.,	B-62	60
129. 026749	5/21/1954	9/1/1958	1,265.00	2 S., 10 W.,	B-62	60
130. 026753	5/21/1954	9/1/1958	600.00	2 S., 10 W.,	B-62	60
131. 026763	5/21/1954	9/1/1958	1,600.00	2 S., 10 W.,	B-62	60
132. 026782	5/21/1954	9/1/1958	1,280.00	2 S., 11 W.,	B-62	60
133. 028711	1/10/1955	9/1/1958	2,580.00	3 N., 9 & 10 W.,	B-19, B-20	76
134. 028604	1/ 7/1955	9/1/1958	2,580.00	3 & 4 N., 10 W.,	B-20	76
135. 028602	1/ 7/1955	9/1/1958	2,580.00	3 N., 10 W.,	B-20	76
136. 028603	1/ 7/1955	9/1/1958	2,580.00	3 N., 10 W.,	B-20	76
137. 028605	1/ 3/1955	9/1/1958	2,580.00	3 N., 10 W.,	B-20	76
138. 028306	12/22/1954	9/1/1958	1,920.00	3 N., 10 W.,	B-20	76
139. 028509	12/22/1954	9/1/1958	1,600.00	3 N., 10 W.,	B-20	76
140. 023500	12/22/1954	9/1/1958	2,240.00	3 N., 10 W.,	B-20	76
141. 028306	12/22/1954	9/1/1958	960.00	3 N., 10 W.,	B-20	76
142. 028307	12/22/1954	9/1/1958	320.00	3 N., 10 W.,	B-20	76
143. 028064	1/14/1955	9/1/1958	2,580.00	3 N., 9 W.,	B-19	77
144. 028710	1/10/1955	9/1/1958	2,580.00	3 N., 9 W.,	B-19	76
145. 028467	12/ 6/1954	9/1/1958	80.00	1 N., 11 W.,	B-22	76
146. 028006	12/22/1954	9/1/1958	1,260.00	1 N., 11 W.,	B-22	76
147. 028501	12/22/1954	9/1/1958	1,000.00	1 N., 11 W.,	B-22	76
148. 028069	10/15/1954	9/1/1958	2,580.00	4 N., 10 W.,	B-20	74
149. 028104	10/15/1954	9/1/1958	2,580.00	4 N., 10 W.,	B-20	74
150. 028048	10/15/1954	9/1/1958	2,580.00	4 N., 10 W.,	B-20	74

See footnotes at end of table, p. 10a.

B. Leases issued after August 14, 1958 on applications filed prior to January 8, 1958—Continued

(NOTE: Leases in conflict with respondents' applications are printed in boldface)

Serial No.	Application Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
151. 029951.....	1/21/1955	9/1/1958	2,560.00	7 N., 9 & 10 W.,	B-19, B-20	77
152. 029166.....	2/15/1955	10/1/1958	1,898.44	11 N., 6 & 7 W.,	B-16, B-17	78
153. 045645.....	2/15/1955	10/1/1958	640.00	11 N., 7 W.,	B-17	144
154. 029167.....	2/15/1955	10/1/1958	2,116.01	11 N., 6 W.,	B-16	78
155. 029168.....	2/15/1955	10/1/1958	2,108.94	11 N., 6 W.,	B-16	78
156. 045644.....	2/15/1955	10/1/1958	1.90	11 N., 6 W.,	B-16	144
157. 029165.....	2/15/1955	10/1/1958	1,433.00	11 N., 7 W.,	B-17	78
158. 030273.....	5/19/1955	10/1/1958	182.51	10 N., 7 W.,	B-17	83
159. 029188.....	2/15/1955	10/1/1958	2,560.00	10 N., 6 & 7 W.,	B-16, B-17	76
160. 029181.....	2/15/1955	10/1/1958	1,400.00	10 N., 6 & 7 W.,	B-16	78
161. 029180.....	2/15/1955	10/1/1958	1,210.00	10 N., 6 & 7 W.,	B-16	78
162. 029182.....	2/15/1955	10/1/1958	2,560.00	10 N., 6 & 7 W.,	B-16	78
163. 029187.....	2/15/1955	10/1/1958	2,560.00	10 N., 6 & 7 W.,	B-16	78
164. 029186.....	2/15/1955	10/1/1958	2,560.00	10 N., 6 & 7 W.,	B-16	78
165. 045641.....	12/20/1954	10/1/1958	228.84	9 N., 10 W.,	B-20	144
166. 045640.....	12/20/1954	10/1/1958	36.40	9 N., 9 W.,	B-19	76
167. 029185.....	2/15/1955	10/1/1958	2,240.00	9 N., 6 W.,	B-16	78
168. 029179.....	2/15/1955	10/1/1958	2,560.00	9 N., 6 W.,	B-16	78
169. 029313.....	3/ 2/1955	10/1/1958	640.00	9 N., 6 W.,	B-16	79
170. 029625.....	4/ 5/1955	10/1/1958	2,560.00	9 N., 6 W.,	B-16	80
171. 029616.....	4/ 5/1955	10/1/1958	2,560.00	9 N., 6 W.,	B-16	80
172. 029184.....	2/15/1955	10/1/1958	2,560.00	9 N., 6 W.,	B-16	78
173. 029613.....	4/ 5/1955	10/1/1958	2,560.00	9 N., 6 W.,	B-16	80
174. 029614.....	4/ 5/1955	10/1/1958	1,920.00	9 N., 6 W.,	B-16	80
175. 029634.....	4/ 5/1955	10/1/1958	1,280.00	9 N., 5 W.,	B-14	80
176. 029622.....	4/ 5/1955	10/1/1958	1,280.00	9 N., 5 W.,	B-14	80
177. 029627.....	4/ 5/1955	10/1/1958	1,280.00	9 N., 5 W.,	B-14	80
178. 029612.....	4/ 5/1955	10/1/1958	2,560.00	9 N., 5 W.,	B-14	80
179. 029611.....	4/ 5/1955	10/1/1958	2,560.00	9 N., 5 W.,	B-14	80
180. 029626.....	4/ 5/1955	10/1/1958	2,560.00	9 N., 5 W.,	B-14	80
181. 029623.....	4/ 5/1955	10/1/1958	640.00	9 N., 5 W.,	B-14	80
182. 029921.....	4/25/1955	10/1/1958	1,280.00	9 N., 4 W.,	B-10	81
183. 029940.....	4/25/1955	10/1/1958	555.00	9 N., 4 W.,	B-10	81
184. 029941.....	4/25/1955	10/1/1958	2,560.00	9 N., 4 W.,	B-10	81
185. 028130.....	10/15/1954	10/1/1958	1,120.02	8 N., 10 W.,	B-20	74
186. 032906.....	10/15/1954	10/1/1958	160.00	8 N., 9 W.,	B-19	93
187. 029178.....	2/15/1955	10/1/1958	2,240.00	8 N., 8 W.,	B-18	78
188. 029685.....	4/ 7/1955	10/1/1958	2,560.00	8 N., 7 W.,	B-17	80
189. 029706.....	4/ 8/1955	10/1/1958	2,560.00	8 N., 6 & 7 W.,	B-16, B-17	80
190. 029637.....	4/ 5/1955	10/1/1958	2,560.00	8 N., 6 W.,	B-16	80
191. 029638.....	4/ 5/1955	10/1/1958	2,560.00	8 N., 6 W.,	B-16	80
192. 029633.....	4/ 5/1955	10/1/1958	2,560.00	8 N., 6 W.,	B-16	80
193. 029705.....	4/ 8/1955	10/1/1958	1,920.00	8 N., 5 & 6 W.,	B-14, B-16	80
194. 029683.....	4/ 7/1955	10/1/1958	2,560.00	8 N., 6 W.,	B-16	80
195. 029681.....	4/ 7/1955	10/1/1958	2,560.00	8 N., 6 W.,	B-16	80
196. 029682.....	4/ 7/1955	10/1/1958	2,560.00	8 N., 6 W.,	B-16	80
197. 029922.....	4/25/1955	10/1/1958	2,560.00	8 N., 6 W.,	B-16	81
198. 029704.....	4/ 8/1955	10/1/1958	1,920.00	8 N., 6 W.,	B-16	80
199. 029929.....	4/25/1955	10/1/1958	2,560.00	8 N., 5 W.,	B-14	81
200. 029927.....	4/25/1955	10/1/1958	2,560.00	8 N., 4 & 5 W.,	B-10, B-14	81
201. 029913.....	4/25/1955	10/1/1958	1,280.00	8 N., 5 W.,	B-14	81
202. 029708.....	4/ 8/1955	10/1/1958	2,560.00	8 N., 5 W.,	B-14	80

See footnotes at end of table, p. 10a.

B. Leases issued after August 14, 1958 on applications filed prior to January 8, 1958—Continued

[Note: Leases in conflict with respondents' applications are printed in boldface.]

Serial No.	Application Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
203. 029019	4/25/1955	10/1/1958	2,560.00	8 N., 4 & 5 W.,	B-10, B-14	81
204. 029016	4/25/1955	10/1/1958	2,560.00	8 N., 5 W.,	B-14	81
205. 030131	5/ 5/1955	10/1/1958	2,560.00	7 N., 5 W.,	B-14	82
206. 030134	5/ 5/1955	10/1/1958	2,560.00	7 N., 5 & 6 W.,	B-14, B-16	82
207. 030136	5/ 5/1955	10/1/1958	2,560.00	7 N., 5 & 6 W.,	B-14, B-16	82
208. 030124	5/ 5/1955	10/1/1958	2,560.00	7 N., 5 & 6 W.,	B-14, B-16	82
209. 030129	5/ 5/1955	10/1/1958	2,560.00	7 N., 5 W.,	B-14	82
210. 030123	5/ 5/1955	10/1/1958	2,560.00	7 N., 5 W.,	B-14	82
211. 030135	11/14/1957	10/1/1958	2,560.00	7 N., 5 W.,	B-14	82
212. 028073	10/15/1954	10/1/1958	2,560.00	6 N., 11 W.,	B-22	74
213. 028134	10/15/1954	10/1/1958	2,560.00	6 N., 10 W.,	B-20	74
214. 028133	10/15/1954	10/1/1958	1,920.00	6 N., 10 W.,	B-20	74
215. 029018	4/25/1955	10/1/1958	2,560.00	8 N., 5 W.,	B-14	81
216. 029020	4/25/1955	10/1/1958	2,560.00	8 N., 5 W.,	B-14	81
217. 029011	4/25/1955	10/1/1958	2,560.00	8 N., 5 W.,	B-14	81
218. 028149	10/15/1954	10/1/1958	2,280.00	7 N., 10 W.,	B-20	74
219. 028137	10/15/1954	10/1/1958	2,560.00	4 N., 10 W.,	B-20	74
220. 029240	2/25/1955	10/1/1958	2,560.00	4 N., 9 W.,	B-19	78
221. 029246	2/25/1955	10/1/1958	1,280.00	4 N., 9 W.,	B-19	78
222. 029243	2/25/1955	10/1/1958	1,920.00	4 N., 9 W.,	B-19	78
223. 029252	2/25/1955	10/1/1958	2,560.00	4 N., 9 W.,	B-19	79
224. 028147	10/15/1954	10/1/1958	1,280.00	3 N., 11 W.,	B-22	74
225. 029037	4/25/1955	10/1/1958	2,560.00	6 N., 7 W.,	B-17	81
226. 029036	4/25/1955	10/1/1958	2,560.00	6 N., 6 & 7 W.,	B-16, B-17	81
227. 029035	4/25/1955	10/1/1958	2,560.00	6 N., 7 W.,	B-17	80
228. 029713	4/ 8/1955	10/1/1958	1,920.00	6 N., 7 W.,	B-17	80
229. 029038	4/ 8/1955	10/1/1958	2,560.00	6 N., 7 W.,	B-17	81
230. 029711	4/ 8/1955	10/1/1958	2,560.00	6 N., 7 W.,	B-17	80
231. 029710	4/ 8/1955	10/1/1958	2,560.00	6 N., 7 W.,	B-17	80
232. 029708	4/ 8/1955	10/1/1958	2,560.00	6 N., 7 W.,	B-17	80
233. 029712	4/ 8/1955	10/1/1958	2,560.00	6 N., 7 W.,	B-17	80
234. 029709	4/ 8/1955	10/1/1958	2,560.00	6 N., 6 & 7 W.,	B-16, B-17	80
235. 029010	4/25/1955	10/1/1958	2,560.00	6 N., 6 W.,	B-16	81
236. 029050	4/22/1955	10/1/1958	2,560.00	6 N., 6 W.,	B-16	81
237. 029061	4/22/1955	10/1/1958	2,560.00	6 N., 6 W.,	B-16	81
238. 029034	4/25/1955	10/1/1958	1,920.00	6 N., 6 W.,	B-16	81
239. 029707	4/ 8/1955	10/1/1958	2,080.00	6 N., 6 W.,	B-16	80
240. 029708	4/13/1955	10/1/1958	2,560.00	6 N., 6 W.,	B-16	81
241. 029060	4/22/1955	10/1/1958	2,560.00	5 & 6 N., 6 W.,	B-16	81
242. 029060	4/25/1955	10/1/1958	2,560.00	6 N., 6 W.,	B-16	81
243. 028150	10/15/1954	10/1/1958	2,560.00	6 N., 9 W.,	B-19	74
244. 028148	10/15/1954	10/1/1958	2,560.00	6 N., 8 W.,	B-19	74
245. 029177	2/15/1955	10/1/1958	2,560.00	6 N., 8 W.,	B-19	78
246. 029084	4/ 7/1955	10/1/1958	2,400.00	7 N., 7 W.,	B-17	78
247. 029026	4/25/1955	10/1/1958	2,560.00	7 N., 7 W.,	B-17	81
248. 029030	4/25/1955	10/1/1958	2,560.00	7 N., 7 W.,	B-17	81
249. 029032	4/25/1955	10/1/1958	2,560.00	7 N., 7 W.,	B-17	81
250. 029033	4/25/1955	10/1/1958	2,560.00	7 N., 7 W.,	B-17	81
251. 029080	4/ 7/1955	10/1/1958	1,440.00	7 N., 6 W.,	B-16	80
252. 029023	4/25/1955	10/1/1958	2,560.00	7 N., 6 & 7 W.,	B-16, B-17	81
253. 029015	4/25/1955	10/1/1958	2,560.00	7 N., 6 W.,	B-16	81
254. 029014	4/25/1955	10/1/1958	2,560.00	7 N., 6 W.,	B-16	81

See footnotes at end of table, p. 10a.

**B. Leases issued after August 14, 1953 on applications filed prior to
January 8, 1953—Continued**

(Note: Leases in conflict with respondents' applications are printed in boldface)

Serial No.	Applica- tion Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
255. 029917.....	4/25/1955	10/1/1958	2,560.00	7N., 6W.,	B-16	81
256. 029926.....	4/25/1955	10/1/1958	2,560.00	7N., 6W.,	B-16	81
257. 029925.....	4/25/1955	10/1/1958	2,560.00	7N., 6W.,	B-16	81
258. 029924.....	4/25/1955	10/1/1958	2,560.00	7N., 6W.,	B-16	81
259. 050133.....	5/ 5/1955	10/1/1958	2,560.00	7N., 5 & 6, W.,	B-14, B-16	82
260. 030125 ¹	5/ 5/1955	10/1/1958	2,560.00	7N., 6W.,	B-16	82
261. 029255 ¹	2/25/1955	10/1/1958	1,280.00	3N., 9W.,	B-19	79
262. 029262.....	2/25/1955	10/1/1958	2,560.00	3N., 9W.,	B-19	79
263. 029261.....	2/25/1955	10/1/1958	2,560.00	3N., 9W.,	B-19	79
264. 029260.....	2/25/1955	10/1/1958	2,560.00	3N., 9W.,	B-19	79
265. 029259.....	2/25/1955	10/1/1958	2,560.00	3N., 9W.,	B-19	79
266. 029256.....	2/25/1955	10/1/1958	1,920.00	3N., 9W.,	B-19	79
267. 029434 ¹	3/13/1955	10/1/1958	970.00	3S., 10W.,	B-62	79
268. 030128.....	5/ 5/1955	10/1/1958	2,560.00	6N., 5W.,	B-14	82
269. 030290 ¹	5/19/1955	10/1/1958	2,560.00	6N., 5W.,	B-14	83
270. 029652.....	4/ 5/1955	10/1/1958	2,560.00	5N., 7W.,	B-17	80
271. 029577.....	4/ 1/1955	10/1/1958	550.00	5N., 7W.,	B-17	80
272. 029619.....	4/ 1/1955	10/1/1958	2,430.00	5N., 7W.,	B-17	80
273. 029630.....	4/ 1/1955	10/1/1958	2,560.00	5N., 7W.,	B-17	80
274. 029628.....	4/ 5/1955	10/1/1958	1,302.00	5N., 6W.,	B-16	81
275. 029709 ¹	4/13/1955	10/1/1958	2,560.00	5N., 6W.,	B-16	81
276. 029779.....	4/14/1955	10/1/1958	160.00	5N., 6W.,	B-16	81
277. 030126.....	5/ 5/1955	10/1/1958	281.00	5N., 6W.,	B-16	82
278. 029961 ¹	4/27/1955	10/1/1958	1,883.00	5N., 6W.,	B-16	81
279. 028139.....	10/15/1955	10/1/1958	2,560.00	4N., 10W.,	B-20	74
280. 029931 ¹	4/ 7/1955	10/1/1958	2,560.00	7N., 7W.,	B-17	81
281. 029183 ¹	2/15/1955	11/1/1958	2,560.00	9N., 6W.,	B-16	78
282. 046431.....	10/15/1954	12/1/1958	403.84	8N., 10W.,	B-20	147
283. 028141 ¹	10/15/1954	12/1/1958	800.00	4N., 11W.,	B-20	74
284. 038375 ¹	9/23/1957	12/1/1958	2,560.00	6 & 7N., 5W.,	B-14	115
285. 038374 ¹	9/23/1957	12/1/1958	2,560.00	6N., 5W.,	B-14	115
286. 038000 ¹	9/ 9/1957	12/1/1958	1,700.00	6N., 6W.,	B-16	114
287. 038012 ¹	2/10/1957	12/1/1958	2,560.00	5 & 6N., 6W.,	B-16	114
288. 039896.....	11/14/1957	1/1/1959	2,560.00	6 & 7N., 5W.,	B-14	121
289. 039894.....	11/14/1957	1/1/1959	2,560.00	6N., 5W.,	B-14	121
290. 039897.....	11/14/1957	1/1/1959	2,560.00	6N., 5W.,	B-14	121
291. 039895.....	11/14/1957	1/1/1959	2,560.00	7N., 5W.,	B-14	121
292. 035056 ¹	8/ 1/1957	1/1/1959	480.00	9N., 4W.,	B-10	105
293. 040636.....	12/12/1957	2/1/1959	260.00	5N., 6W.,	B-16	124
294. 039877.....	11/13/1957	3/1/1959	2,560.00	6N., 5W.,	B-14	121
Total acre- age leased.....			621, 224.84			

¹ Lease later subdivided into two or more leases.

² Lease covers additional acreage not within the described area.

³ Lease later modified to reduce the area leased. The acreage given is of the area originally leased.

SUMMARY II

**LEASES ISSUED IN THE AREA WITHIN THE KENAI NATIONAL
MOOSE RANGE, EXCEPTED FROM EXECUTIVE ORDER 8979, BUT
WITHDRAWN FROM SETTLEMENT BY PUBLIC LAND ORDER 487
(JUNE 16, 1948, 18 F.R. 8482)**

A. Leases issued prior to September 8, 1955

Serial No.	Applica- tion Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
1. 028025 ¹	1/10/1955	5/ 1/1955	185.80	5 N., 9 W.	B-19	77
2. 028026 ¹	2/ 7/1955	7/ 1/1955	255.51	5 N., 10 & 11 W.	B-20, B-23	78
Total acreage leased.....			441.30			

¹ Lease later subdivided into two or more leases.

² Lease later modified to reduce the area leased. The acreage given is of the area originally leased.

B. Leases issued after September 8, 1955 on applications filed prior to that date

(NOTE: Leases in conflict with respondents' applications are printed in boldface)

Serial No.	Applica- tion Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
1. 028047 ²	10/15/1954	10/1/1955	2,538.10	4 N., 11 W.,	B-22	74
2. 028053 ¹	10/15/1954	10/1/1955	2,560.00	4 N., 11 W.,	B-22	74
3. 028052.....	10/15/1954	10/1/1955	2,797.04	4 N., 11 W.,	B-22	74
4. 028067.....	10/15/1954	10/1/1955	2,371.00	5 N., 11 W.,	B-22	74
5. 028038 ¹	10/15/1954	10/1/1955	1,969.22	5 N., 9 W.,	B-19	74
6. 028070.....	10/15/1954	10/1/1955	2,378.43	5 N., 8 W.,	B-18	74
7. 028068.....	10/15/1954	10/1/1955	2,292.23	5 N., 11 W.,	B-22	74
8. 028055.....	10/15/1954	10/1/1955	2,342.00	5 N., 11 W.,	B-22	74
9. 028053.....	10/15/1954	10/1/1955	2,518.14	5 N., 10 W.,	B-20	74
10. 028053.....	10/15/1954	10/1/1955	1,795.09	5 N., 9 & 10 W.,	B-19, B-20	74
11. 028067.....	10/15/1954	10/1/1955	1,877.31	5 N., 9 W.,	B-19	74
12. 028058 ¹	10/15/1954	11/1/1955	1,747.00	5 N., 12 & 12 W.,	B-24	74
13. 028058.....	1/10/1955	11/1/1955	1,487.30	5 N., 9 W.,	B-19	74
14. 028071.....	10/15/1954	11/1/1955	2,063.00	5 N., 8 W.,	B-18	74
15. 028060.....	10/15/1954	11/1/1955	2,561.00	5 N., 8 W.,	B-18	74
16. 028064.....	10/15/1954	11/1/1955	2,308.24	5 N., 10 W.,	B-20	74
17. 028062.....	10/15/1954	11/1/1955	2,183.27	5 N., 10 W.,	B-20	74
18. 028080 ²	10/ 1/1954	11/1/1955	1,920.00	5 N., 10 W.,	B-20	74
19. 028061.....	10/ 1/1954	11/1/1955	1,881.05	5 N., 10 W.,	B-20	74
20. 028558.....	12/17/1954	5/1/1956	111.22	5 N., 10 W.,	B-20	76
21. 027028 ¹	2/ 2/1954	7/1/1955	827.78	3 N., 12 W.,	B-24	70

See footnotes at end of table, p. 12a.

B. Leases issued after September 9, 1955 on applications filed prior to that date—Continued.

Serial No.	Application Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
32. 028054 ¹	10/15/1954	9/1/1958	1,833.97	4 N., 11 W.,	B-23	74
33. 028100	10/15/1954	9/1/1958	349.50	4 N., 11 W.,	B-22	74
34. 028117 ¹	10/15/1954	9/1/1958	2,340.00	4 N., 11 W.,	B-22	74
35. 028072 ¹	10/15/1954	9/1/1958	1,920.00	6 N., 11 W.,	B-22	74
36. 028102	10/15/1954	9/1/1958	1,680.00	5 N., 11 W.,	B-22	74
37. 028050	11/30/1953	9/1/1958	197.78	6 N., 12 W.,	B-24	65
38. 028123 ¹	10/15/1954	9/1/1958	1,290.00	3 N., 11 W.,	B-22	74
39. 028090	10/15/1954	9/1/1958	1,736.82	3 N., 11 W.,	B-22	74
30. 028112 ¹	10/15/1954	9/1/1958	2,188.38	5 N., 8 W.,	B-18	74
31. 028089 ¹	10/15/1954	9/1/1958	2,169.00	5 N., 8 W.,	B-18	74
32. 028111	10/15/1954	9/1/1958	2,162.04	5 N., 8 W.,	B-18	74
33. 028072	11/30/1953	9/1/1958	608.24	6 N., 12 W.,	B-24	65
34. 028142	10/15/1954	10/1/1958	2,560.00	4 N., 11 W.,	B-22	74
35. 028133 ¹	10/15/1954	10/1/1958	2,421.28	6 N., 10 W.,	B-24	74
36. 028088	10/15/1954	10/1/1958	1,429.62	6 N., 11 W.,	B-22	74
37. 028135	10/15/1954	10/1/1958	2,164.56	5 N., 10 W.,	B-20	74
38. 028136	10/15/1954	10/1/1958	2,062.38	5 N., 10 W.,	B-20	74
39. 028106	10/15/1954	10/1/1958	1,212.00	5 N., 10 W.,	B-20	74
40. 048690	11/30/1953	10/1/1958	459.04	6 N., 12 W.,	B-24	145
41. 028124	10/15/1954	10/1/1958	2,315.78	5 N., 9 W.,	B-19	74
42. 028125	10/15/1954	10/1/1958	2,508.82	5 N., 9 W.,	B-19	74
43. 028126	10/15/1954	10/1/1958	2,079.00	5 N., 8 W.,	B-18	74
44. 028127	10/15/1954	10/1/1958	1,920.00	5 N., 8 W.,	B-18	74
45. 028128	10/15/1954	10/1/1958	1,515.61	5 N., 8 W.,	B-18	74
46. 045775	10/15/1954	10/1/1958	640.00	5 N., 8 W.,	B-18	145
47. 045782	10/15/1954	10/1/1958	575.99	5 N., 8 W.,	B-18	145
48. 045643	10/15/1954	10/1/1958	640.00	5 N., 11 W.,	B-22	144
49. 046642	10/15/1954	10/1/1958	640.00	4 N., 11 W.,	B-22	144
50. 045046	10/15/1954	10/1/1958	640.00	3 N., 11 W.,	B-22	144
51. 028101	10/15/1954	11/1/1958	2,560.00	4 N., 11 W.,	B-22	74
52. 028143	10/15/1954	11/1/1958	1,702.36	4 N., 12 W.,	B-24	74
53. 028087 ¹	10/15/1954	11/1/1958	2,560.00	6 N., 11 W.,	B-22	74
54. 028113 ¹	10/15/1954	11/1/1958	2,560.00	6 N., 11 W.,	B-22	74
55. 028103 ¹	10/15/1954	11/1/1958	1,253.19	5 N., 11 W.,	B-22	74
56. 028146	10/15/1954	11/1/1958	2,069.63	5 N., 11 W.,	B-22	74
57. 028071 ¹	11/30/1953	11/1/1958	63.36	6 & 7 N., 12 W.,	B-24	65
58. 028001	10/15/1954	11/1/1958	2,276.06	3 N., 11 W.,	B-22	74
59. 027020	8/ 3/1954	11/1/1958	1,515.18	3 N., 11 W.,	B-22	72
60. 028108	10/15/1954	11/1/1958	1,280.00	5 N., 9 W.,	B-19	74
61. 028141 ¹	10/15/1954	12/1/1958	1,760.00	4 N., 11 W.,	B-22	74
62. 028144	10/15/1954	12/1/1958	1,319.13	3 N., 12 W.,	B-24	74
63. 028107 ¹	10/15/1954	12/1/1958	1,258.83	5 N., 10 W.,	B-20	74
64. 028047 ¹	11/30/1953	12/1/1958	701.59	6 N., 12 W.,	B-24	65
65. 028099 ¹	10/15/1954	12/1/1958	1,205.10	3 N., 11 W.,	B-22	74
66. 028109 ¹	10/15/1954	12/1/1958	2,217.25	5 N., 9 W.,	B-19	74
67. 046908	10/15/1954	1/1/1959	640.00	6 N., 11 W.,	B-22	145
68. 046904	10/15/1954	1/1/1959	528.97	4 N., 12 W.,	B-24	145
69. 046903	10/15/1954	1/1/1959	493.62	5 N., 11 W.,	B-22	145
70. 028138	10/15/1954	2/1/1959	1,605.81	5 N., 11 W.,	B-22	74
71. 080247 ¹	5/19/1955	6/1/1959	27.63	5 N., 11 W.,	B-22	82
72. 028714 ¹	1/10/1955	10/1/1959	508.69	5 N., 9 W.,	B-19	74
Total acreage leased			116,437.27			

¹ Lease later subdivided into two or more leases.

² Lease covers additional acreage not within the described area.

SCHEDULE III

LEASES ISSUED IN THE AREA WITHIN KENAI NATIONAL MOOSE RANGE WHICH WAS NOT WITHDRAWN FROM SETTLEMENT EITHER BY EXECUTIVE ORDER 8979 OR BY PUBLIC LAND ORDER 487, PURSUANT TO OFFERS FILED PRIOR TO AUGUST 14, 1958

Serial No.	Application Date	Lease Date	Acreage	Township and Range	Plat Book No.	Serial Book No.
1. 026390 ¹	4/ 1/1954	10/1/1954	2,301.39	8 N., 11 W.	B-22	67
2. 025851 ¹	11/30/1953	1/1/1955	2,560.00	7 N., 11 W.	B-22	65
3. 026391	4/ 1/1954	1/1/1955	1,920.00	7 N., 11 W.	B-22	67
4. 026394 ²	4/ 1/1954	1/1/1955	1,440.00	7 N., 11 W.	B-22	67
5. 026395	4/ 1/1954	1/1/1955	2,560.00	7 N., 11 W.	B-22	67
6. 026396	4/ 1/1954	1/1/1955	2,560.00	8 N., 11 W.	B-22	67
7. 026397 ¹	4/ 1/1954	1/1/1955	2,560.00	7 N., 11 W.	B-22	67
8. 025843 ³	11/30/1953	9/1/1958	2,300.00	7 N., 11 W.	B-22	65
9. 028187 ³	10/22/1954	9/1/1958	1,080.00	7 N., 11 W.	B-22	74
10. 028186 ³	10/22/1954	9/1/1958	300.00	7 N., 11 W.	B-22	74
11. 028121 ^{3 4}	10/22/1954	9/1/1958	600.00	7 N., 10 W.	B-20	74
12. 028114 ³	10/15/1954	9/1/1958	1,540.00	6 N., 11 W.	B-22	74
13. 027849 ¹	9/17/1954	9/1/1958	2,080.00	6 N., 11 W.	B-22	73
14. 028072 ^{1 2}	9/17/1954	9/1/1958	640.00	6 N., 11 W.	B-22	74
15. 025845	11/30/1953	9/1/1958	640.00	6 N., 11 W.	B-22	65
16. 028079 ³	10/15/1954	9/1/1958	30.00	6 N., 10 W.	B-20	74
17. 028063 ³	10/15/1954	9/1/1958	15.00	3 N., 11 W.	B-22	74
18. 028123 ³	10/15/1954	9/1/1958	1,760.00	3 N., 11 W.	B-22	74
19. 028004	10/15/1954	9/1/1958	1,260.00	3 N., 11 W.	B-22	74
20. 025848 ³	11/30/1953	9/1/1958	2,284.17	8 N., 11 W.	B-22	65
21. 028096 ³	10/15/1954	9/1/1958	2,191.62	8 N., 10 W.	B-20	74
22. 032009	10/15/1954	9/1/1958	2,960.00	8 N., 10 W.	B-20	93
23. 028075	10/15/1954	9/1/1958	2,660.00	8 N., 10 W.	B-20	74
24. 028115 ³	10/15/1954	9/1/1958	1,280.00	8 N., 10 W.	B-20	74
25. 028074	10/15/1954	9/1/1958	2,560.00	8 N., 10 W.	B-26	74
26. 028073 ^{1 2}	10/15/1954	10/1/1958	610.00	6 N., 11 W.	B-22	74
27. 028129	10/15/1954	10/1/1958	2,560.00	6 N., 11 W.	B-22	74
28. 028130 ³	10/15/1954	10/1/1958	923.55	8 N., 10 W.	B-20	74
29. 032905	10/15/1954	10/1/1958	800.60	8 N., 10 W.	B-20	93
30. 025393	4/ 1/1954	10/1/1958	640.00	7 N., 12 W.	B-24	67
31. 025873 ^{1 4}	11/30/1953	11/1/1958	753.64	8 N., 11 W.	B-22	65
32. 025871 ³	11/30/1953	11/1/1958	286.84	7 N., 12 W.	B-24	65
33. 025870 ³	11/30/1953	11/1/1958	151.10	7 N., 12 W.	B-24	65
34. 025847 ^{3 4}	11/30/1953	12/1/1958	542.69	6 N., 12 W.	B-24	65
35. 046431	10/15/1954	12/1/1958	619.49	8 N., 10 W.	B-20	147
36. 025846 ^{3 4}	11/30/1953	12/1/1958	700.35	7 N., 12 W.	B-24	65
37. 025844 ³	11/30/1953	12/1/1958	795.97	7 N., 12 W.	B-24	65
38. 026392 ³	4/ 1/1954	2/1/1959	2,560.00	8 N., 11 W.	B-22	67
39. 025842 ³	11/27/1953	2/1/1959	1,255.07	7 N., 11 W.	B-22	65
40. 037776	9/ 9/1957	9/1/1959	59.77	8 N., 11 W.	B-22	113
41. 025852 ^{1 4}	11/30/1953	9/1/1959	860.00	7 N., 12 W.	B-24	65
42. 025853 ³	11/30/1953	9/1/1959	2,353.64	7 N., 11 W.	B-22	65
Total acreage leased			57,425.59			

¹ Lease later subdivided into two or more leases.

² Lease covers additional acreage not within the described area.

³ Lease later modified to reduce the area leased. The acreage given is of the area originally leased.

⁴ Additional acreage later added to lease.

LICENSABLE
SUPREME COURT, etc.

RECEIVED
FILED
NOV 10 1904
U.S. DIST. CT.

IN THE
Supreme Court of the United States
October Term, 1904

No. 34

BREWSTER L. UDALL, Secretary of the Interior,
Petitioner

v.

JAMES K. TARTAGLIA, et al., Respondents

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

JAMES K. TARTAGLIA
213 Capital Building
Washington, D.C.
is hereby named,
and an attorney for
said Respondents

INDEX

Points Relied Upon for Rehearing.....	1
Discussion of Points Relied Upon for Rehearing (Points are Summarized)	
I. Failure to consider the improper preferences granted the Amici oil companies	4
II. Finding, without trial or hearing, that the Secretary construed orders not to bar oil and gas leasing and which if tried, will not stand.....	5
III. Finding that Respondents do not claim to have relied to their detriment upon a contrary construction not supported by the record.....	8
IV. Unwarranted weight given to hearsay document not in evidence and not of public record consisting of a Memorandum dated August 31, 1953.....	12
V. Inference that Court of Appeals failed to attach proper significance to administrative practice because of misinformation	13
VI. Misinterpretation of fish trap exception, whereas trial or hearing on this issue would prove intentional inclusion to preclude oil and gas leasing.....	14

Summary	15
Certificate of Good Faith	18
Proof of Service	18

CITATIONS

Cases:

Organized Village of Kake vs. Egan, 396 US 60	15, 16
--	--------

Statutes and Ordinances:

Mineral Leasing Act of 1920	5
Ordinance No. Three, Section One, Constitu- tion of the State of Alaska	16
Public Law 85-508; 72 Stat. 339	9
30 USCA 191	5

Executive and Public Land Orders:

Executive Order 8979	2
Executive Order No. 8857	16
Public Land Order 487	2

Miscellaneous:

Alaska Department of Lands, Mines and Min- erals Publication for April, 1965	5
HEARINGS before the SUBCOMMITTEE ON PUBLIC LANDS of the COMMITTEE ON	

INTERIOR AND INSULAR AFFAIRS	
UNITED STATES SENATE, Eighty-Sixth	
Congress, First Session on S. 1670 of	
June 19, 1959 and Part 2 of October 28	
and November 3, 1959	9
Intra-Agency letter dated August 31, 1953...	3
Marathon Oil and Union Oil Amici Curiae	
Brief	13
Respondents Brief	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, Secretary of the Interior,
Petitioner

v.

JAMES K. TALLMAN, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

Respondents respectfully pray that a Rehearing
in this case be granted.

POINTS RELIED UPON FOR REHEARING

On March 1, 1965, this Court in an opinion delivered by the Honorable Chief Justice Earl Warren reversed the judgment of the Court of

Appeals for the District of Columbia Circuit, which had ordered judgment entered for the Respondents.

It is the Respondents belief that the opinion of this Court is in error in the following respects:

I.

That the opinion failed to consider the improper preferences granted the *Amici* Oil Companies after allowing them to drill in the Swanson River Area of the Moose Range, under a specific contract.

II.

The opinion has apparently found as a fact, that:

"...the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record."¹

This finding has been made without a single word of competent testimony taken before any tribunal, and if the Court below was in error in arriving at an opposite conclusion, then so is this Court since this issue has never been tried. Further, the Respondents contend that an open examination of the facts before some trial Court would establish by more than a preponderance, that prior to the order of January 8, 1958, the Secretary *had* interpreted the orders as barring oil and gas leasing.

¹ Orders are Executive Order 8979 and Public Land Order 487.

III.

The Court's finding that

"...respondents do not claim to have relied to their detriment upon a contrary construction."²

is not supported by the record, and a trial of this issue will clearly establish both reliance and detriment.

IV.

That in arriving at the decision, this Court has given unwarranted weight to a hearsay document that is not in evidence, has not been offered in evidence, is not authenticated, and is not a matter of public record, namely the Memorandum dated August 31, 1953 and purportedly signed by the Acting Director of the Bureau of Land Management.

V.

The inference in the opinion that the Court of Appeals failed to attach proper significance to the administrative practice because of misinformation may be in error since the granting of leases was brought to the Court's attention.

VI.

The opinion has misinterpreted the fish trap exception because of a misunderstanding of the

² Slip Opinion page 3

nature of traps; that a trial or hearing on this factual issue would show the intentional inclusion of the exception clause, showing an intent to preclude oil and gas leasing at the time of issuing Executive Order 8979.

DISCUSSION

I.

The impropriety of granting preferences after the discovery in Swanson River Area, has never been touched on by any Court. Yet the regulations adopted in 1958³ did result in such preferences, particularly as to *Amici* Standard and Richfield, since obviously fashioned to prefer the "suspended" applications.

The opinion noted the various agreements between the different branches of Interior and Congress⁴, but in addition to such agreements the Swanson River Area differed from regular leasing in that a specific contract was entered. The only evidence of this, however, appears in a letter dated August 7, 1953 from the Director of Fish and Wildlife Service to the Director, Bureau of Land Management, wherein the contract was referred to under a specific number, 14-08-001-2969.⁵

It is common knowledge that oil well drilling is generally kept under "top secret" security. Thus, under a special contract with the Interior Department, the *Amici* were given access to an area of public domain, acquired specialized geo-

³ 43 CFR 192.9 and 23F.R. 5883

⁴ Slip Opinion page 10

⁵ Appendix 11a Respondents brief in this Court.

logical information which was kept secret, then given leasing preferences in areas adjoining the unit covered by the contract.

Improprieties in leasing procedures in the Moose Range affect not only Respondents, but the entire State of Alaska. The Mineral Leasing Act of 1920 would require competitive leasing of the known geological structure, of areas not yet leased, when the structure became known.

Instead of following the Mineral Leasing Act of 1920, the preferences noted above were given. The net result is a loss of bonuses to the Federal Government possibly as high as \$100,000,000.00, 90 per cent of which would go to the State of Alaska.⁶

Amici would probably deny the latter estimate, but they have misled the Courts before by inferring that they would lose their investments in the Kenai. They have far more than recovered their investments by the 40,953,128 barrels of crude recovered through March 1, 1965.⁷ At the well-head price of \$3.00 per barrel this is over 122 million dollars.

Even after the deduction of royalties the *Amici* would have a substantial profit over and above all costs to date, according to the figures in the briefs that have been filed in the Court below and here. The *in terrorem* argument should not be permitted to out-weigh the improprieties of the preferences noted.

II.

The vice of the Court's finding lies not only in

⁶ 30 USCA 191

⁷ Alaska Department of Lands, Mines and Minerals Publication for April, 1965

the resort to matters *dehors* the record, but is a finding that will not stand if the issues were tried.

No hearings for the determination of factual issues have been held in this matter, at any administrative level or in any Court. This includes the District Court which had entered summary judgment against the Respondents based upon "there being no genuine issues of material fact.."

In view of this Court's holding, that, essentially, the Secretary's interpretation determines whether or not the lands were open to lease offers, the determination of such Secretarial interpretation is vital. The record, however, shows that the question was presented to the District Court, but never resolved by trial. In Respondents' *Statement under Rule 0(h) to accompany Plaintiff's Motion for Summary Judgment* filed August 23, 1962⁸ the last sentence of Paragraph 2. stated:

"...so that the lands involved in this case first became open to lease offers thereunder on August 14, 1958.⁹"

In response to this statement, urged as a fact by the Respondents, the Petitioner, in an instrument entitled *Defendant's Response to Plaintiff's Material Facts* - filed September 4, 1962 stated:

"2. Defendant controverts the statement in the last sentence of paragraph 2, to the effect that the lands involved in this case first became open to lease offers on August 14, 1958¹⁰."

⁸ TR 73

⁹ TR 74

¹⁰ TR 78

This controverted issue was, therefore, clearly presented to the District Court, but apparently resolved, without trial, through allegations and inferences. No specific finding was made by the District Court, but the issue was presented to the Court in granting Summary Judgment, presumably resolved it against the Respondents.

With no trial record settling this issue, the Court of Appeals must have followed a similar method, but decided the issue in favor of Respondents.

This Court, still without benefit of trial, finally resolved the issue, for the third time, against Respondents.

The lack of record is possibly responsible for some of the terminology appearing speculative in the opinion:

"Had the Secretary thought..."¹¹

"...if the Secretary had meant to exercise such power..."¹²

"Submission of a plan... *might have been* regarded..."¹³

"The applicants *may have submitted*..."¹⁴

It is the Respondents contention that if the issue concerning the status of the Moose Range with respect to leasing were aired in a public hearing or trial, that clear and convincing evidence could be elicited showing that the Moose Range was considered closed to oil and gas leasing by the various agencies and employees of the Interior Department. This would include testimony of the

¹¹ Slip Opinion page 5

¹² Slip Opinion page 8

¹³ Slip Opinion footnote page 11

¹⁴ Slip Opinion footnote page 11

Range Manager and others associated with control of the range in addition to the Bureau of Land Management personnel. Further, homesteaders and residents in the area of the Moose Range would overwhelmingly show that the Moose Range was closed to the general public as far as leasing was concerned.

The determination of this issue should be made by some means other than inferences and self-serving statements made after the leasing was authorized by the Orders of 1958.

III.

Respondents *have* relied upon the contrary construction and their detriment is certainly overwhelming, since their lease applications were denied. Respondents, along with the general public were led to believe that the Moose Range was closed to oil and gas leasing. In addition to the information that was available in Alaska, Respondents also relied upon the matters of public record. If this were misinformation, it could possibly be due to the treatment of the Alaska people by the Interior Department as second class citizens, and prior to Statehood such abuses were rampant.

At the time of the leasing activity in the Moose Range, the Alaskan people were still disenfranchised colonials, with no voting power in either Congress or for the President. As a result of this political condition, the Interior Department could, and did, treat the rights of the Alaskan people lightly. For an example of some of the abuses, see the discussion concerning fish traps *infra*, but also see the publications

covering the hearings upon the mineral rights for Alaskan Homesteaders.¹⁵ The hearings are too extensive to cover adequately in this petition, but there is an extensive showing that the Interior Department, and in particular the Bureau of Land Management, was discriminatory towards Alaskans and was guilty of other improprieties.

It is interesting to note that the abuses against homesteaders were aired and remedied only after Alaska acquired Statehood¹⁶ and had Senatorial representation. The hearings were conducted by Alaska's Senator Ernest Gruening.

Until this case came to this Court, the issues were limited to the ten leases that were actually in controversy. Both the summary judgment of the District Court and the judgment of the Court of Appeals dealt only with the ten leases in controversy. The Government as well as Respondents at all stages limited the case to these particular leases. However, the opinion in this case expands the decision far beyond the issues heretofore presented, and the determination made from material outside the record and affidavits first presented in this Court. By far the major part of the opinion is based upon facts and material which the Respondents have not yet had the chance to controvert.

If the case were remanded and Respondents given a chance to bring forth the full facts, the following are a few of the facts that can be shown:

¹⁵ HEARINGS Before the SUBCOMMITTEE ON PUBLIC LANDS of the COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE Eighty-Sixth Congress, First Session on S.1670, of June 19, 1959 and Part 2 of October 28 and November 3, 1959.

¹⁶ Public Law 85-508; 72 Stat. 339

1. The so-called Griffin group are not independent individuals as the Government asserted for the first time in this Court, but were agents and representatives of the major oil companies as found by the Court below and undenied at that time by *Amici*.
2. That all of the offers filed in 1954 and 1955 for lands in the Kenai National Moose Range were, with minor exceptions, filed by the agents and representatives of the *Amici* oil companies in a planned raid upon hitherto assumed closed national wildlife refuge. It was no accident that so many of the oil company offers were filed on about the same date.
3. That prior to the time of the 1954, 1955 oil company offers, and for some time thereafter, the official policy of the Department of Interior made known to the public through the local land office officials was that the lands were closed to leases under the terms of the 1941 Executive Order.
4. That the *Amici* oil companies had inside information from within the Department, and pressures were being brought to bear to change this policy and permit leasing of the Kenai and other wildlife refuges.
5. Respondents, in no way connected with the oil companies, relied on the announced position of the local officials and believed the lands to be closed.
6. That subsequently, officials in the Department of Interior who were in favor of oil companies developing refuges announced for the first time in 1956 (in hearings) that they considered

such land open. However, the matter was even then never clearly set forth with respect to the Kenai refuge and the December, 1955, regulations were ambiguous with respect thereto.

7. That prior to 1958 there were no leases issued in the closed area in the Kenai Range with the exception of the Swanson River Unit, discussed in I. above.
8. That the peculiar circumstances surrounding the creation of the Swanson River Unit has never been put before the Court except for a distorted partial presentation.
9. That prior to the time that the lands were declared to be open to lease offers in August, 1958, the Respondents filed lease offers for nine of the same ten leases in April, 1958, which were rejected by the Department on the ground that until August, 1958, the lands were closed to the filing of lease offers. However, the Department did not reject the lease offers filed in 1954 and 1955 by the oil company representatives, referred to as the Griffin leases.
10. That the public, and Respondents in particular, have never had an equal chance to submit offers on the lands involved herein for the reason that the Secretary has arbitrarily administered public land laws in such a way as to improperly favor the acquisition of these lands by major oil companies, and that *at best* such improprieties were of extremely questionable ethical character.

The Respondents propose to obtain affidavits that will make a showing that the public was led to

believe by the Department of Interior employees that the Moose Range was closed to oil and gas leasing during the times pertinent herein. However, because of lack of time they may not be obtained at the time of filing this petition.

IV

There can be little doubt but that this Court placed great reliance upon the intra-agency Memorandum as follows:

"Action on them was suspended in accordance with the 1953 directive, but none was rejected on the ground that the land in question was closed to leasing."¹⁷

How a defective piece of hearsay can be given the force of a "directive" is not explained. Particularly inconsistent with this reasoning is the observation in the opinion two pages later setting forth certain procedures:

"Moreover, the President's 1952 delegation to the Secretary of power to make or modify withdrawals had directed that '(a)ll orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted ... for filing and for publication in the FEDERAL REGISTER.' Executive Order No. 10355, 17 Fed. Reg. 4831 (emphasis added)."¹⁸

¹⁷ Slip Opinion page 6

¹⁸ Slip Opinion page 8

If the letter was published, no evidence of such appears in the record. Yet the Executive Order requiring publication of withdrawal modifications was in effect. In all probability, the Griffin lease applications would have been rejected except for this questionable document, not a public record.

The dangers of relying upon unauthenticated hearsay material, which is not in the record, are elementary, but in the case at bar, they are even more patent. The letter was apparently directed "*Regional Administrators, Regions 1 to 7, inclusive; Managers Land and Land and Survey Offices*",¹⁹ but there is no showing that this letter is applicable in any way to Alaska or to the refuge involved herein. More than a little explanation would be in order, since it is reported that Alaska is not in any region of the Bureau of Land Management at the present time, and has not been for many years, although it is reported to be in Region 10 of one of the Interior Departments.²⁰

Again the basic defect stems from the fact that material considered is not in the record and has not been exposed to the light of a trial of the issues. A trial would determine the authority of the Acting Director, the time given effect, and of particular interest to this case, the effect of the letter on the Moose Range.

V

Because of the complex factual pattern it is true that Respondents inadvertently stated that

¹⁹ Brief of Amici Curiae Marathon Oil and Union Oil page, 13a Appendix

²⁰ Information received from Anchorage Bureau of Land Management

no leases were granted prior to 1958. This inadvertence was, however, roundly belabored by *Amici Curiae* in their *Motion for Leave to File and Brief of Richfield Oil Corporation, as Amicus Curiae in Support of Appellee's Petition for Rehearing*²¹ and it can hardly be claimed that the Court of Appeals had no knowledge of such leasing prior to their final action in this matter. In addition, the Respondents' brief entitled *Objection of Appellants To Motions For Leave to File Briefs Amicus Curiae by Richfield Oil Corporation, Shell Oil Corporation and Standard Oil Corporation of California* expressly covered the Swanson River leases and those of the excepted area.²²

No attempt was made to mislead the Court of Appeals, but if the Court had lacked information when the opinion was issued the matter had been corrected by the briefs, and presumably considered, when the Court ruled on the Petition for Rehearing.

VI

The lack of a record is glaringly apparent in this Court's interpretation of the fish trap exception.²³ A trial would show that the exception was not designed to "assure the Alaskans," but was designed to protect the absentee cannery owners who operated traps. It could be shown further that the traps were actually depriving Alaska fishermen of a livelihood dependent upon the salmon catch, since the canneries that had traps did not need fishermen. And a trial could also

²¹ Page 11-12 of cited brief

²² Pages 5 and 6 of cited brief

²³ Slip Opinion page 21

show the intentional nature of the inclusion.

The opinion refers to *Organized Village of Kake vs. Egan*, 369 US 60, but that decision appears inapplicable to the Kenai Peninsula and Western Alaska. The village of Kake is about seven hundred fifty miles from the Kenai area and involves a communal village of natives who did operate a trap for the benefit of the village. However, the dissent from the extension of the stay in *Kake* brings out facts which show that the conclusions reached in the opinion herein are incorrect. In quoting from Senafor Gruening's book, the opinion noted:

"Beginning in 1931 the Territorial Legislature memorialized Congress condemning the use of the fish trap because of its adverse effect on salmon and on the salmon industry."²⁴

Further on the same page the opinion noted a statement by Senator Gruening:

"In a referendum on fish traps in 1948, 88.7% of the people of Alaska voted for trap abolition, and Angoon's vote was 49 to 9 and Kake's 123 to 6 against traps. Yet Secretary Seaton sought to force traps upon them and on the people of Alaska."²⁵

The opinion on the same page takes notice of the Alaska State Supreme Court's attitude toward fish traps:

"The devastating effect of fish traps upon Alaska's economy was described by the Alaska Supreme Court: ... "²⁶

The Alaska Supreme Court explained the destructiveness of the traps and referred to the

²⁴ *Kake Village vs. Egan* page 78

²⁵ *Kake Village vs. Egan* page 78-79

²⁶ *Kake Village vs. Egan* page 79

Secretary's regulations as "discrimination against all fishermen."²⁷

In addition to the action of the Legislature and the Referendum of 1948 the people of Alaska again voted for the abolition of fish traps when voting upon the ratification of the Constitution²⁸, and traps were finally outlawed by statute.

From the foregoing it is apparent that the opinion's interpretation of the fish trap exception is incompatible with the attitude of Alaskans toward fish traps.

This Court also refers to Executive Order No. 8857, 6 Fed. reg. 4287, establishing the Kodiak refuge.²⁹ Apparently the Court noted that the Executive Order did not include the fish trap exception. But the reason is quite obvious, since the Kodiak refuge specifically excluded the shore area where traps would be anchored by the following:

"...except a strip one mile in width along the shore line,..."

Instead of being "carelessly placed" the fish trap exception in Executive Order 8979 was probably the most intentional wording in the entire order.

SUMMARY

During oral argument, the lack of a record was highlighted by one of the questions asked by one member of the Court;

"Do you want us to try this case on affidavits here?"³⁰

²⁷ Kake Village vs. Egan, page 79

²⁸ Ordinance No. Three, Section One, Constitution of the State of Alaska

²⁹ Slip Opinion page 21

³⁰ Questioning by Mr. Justice Goldberg - (wording may not be exact, but is according to recollection of counsel)

Perhaps worse than trying the case on affidavits presented in the Supreme Court would be the determination of the issues based upon inferences, allegations and other evidence not in the record, and presented for the first time to this Court. This would actually deprive Respondents of rights that are normally protected by our highest court. Yet respondents contend that this, substantially, has happened.

Only by remanding this case for determination of factual issues such as Secretarial Interpretations, improprieties in leasing, information given the public, and other issues, can the ultimate issue of who are entitled to the 10 leases herein be settled. Respondents claim that it will be shown clearly to be them.

Respondents respectfully pray that this Petition for Rehearing be granted and that this case be remanded for the taking of further evidence and for establishing the factual issues relevant to the determination of who is entitled to the leases involved herein.

Respectfully submitted.

James K. Tallman
213 Central Building
Anchorage, Alaska
in propria persona,
and as Attorney for
other Respondents

April 3, 1965

CERTIFICATE OF GOOD FAITH

I, James K. Tallman, appearing *in propria persona*, and as Attorney for the other Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

James K. Tallman

PROOF OF SERVICE

I, James K. Tallman, appearing *in propria persona*, and as Attorney for the other Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that upon the 3rd day of April, 1965, I served copies of the foregoing Petition for Rehearing upon Counsel for the Petitioner, and *Amici Curiae* as follows:

1. On Counsel for the Petitioner, by mailing three copies in a duly addressed envelope thereof and sent to the office of:

Solicitor General
Department of Justice
Washington 25, D. C.

by airmail, postage prepaid.

2. On Counsel for *Amici Curiae*, by mailing three copies each in a duly addressed envelope

with airmail postage prepaid, to the respective attorneys, as follows:

TO: Clayton L. Orn
Attorney for Amicus Curiae Marathon
Oil Company
Marathon Oil Company Building
Findlay, Ohio

TO: Marion D. Plant
Attorney for Amicus Curiae, Union Oil
Company of California
111 Sutter Street
San Francisco, California

TO: William J. DeMartini
Attorney for Amicus Curiae
Richfield Oil Corporation
Richfield Building
Los Angeles, California

TO: Clark M. Clifford
Attorney for Amicus Curiae
Standard Oil Company of California
1523 L Street, Northwest
Washington, D. C.

James K. Tallman